(5)

No. 91-1306

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

GUY W. OLANO, JR. AND RAYMOND M. GRAY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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No. 91-1306

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS[1]

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[1] The opinion, order denying rehearing and rehearing en banc, and judgment of the court of appeals are printed in the appendix to the petition for a writ of certiorari, and have not been reproduced here.

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

CR86-202R

U.S.

vs.

JOSEPH S. ASCANI, ET AL.

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
1986		
Jul 22	1	COMPLAINT as to Defs *MANSOUR* & *McCUIN*
July 24	2	INDICTMENT as to all Defs
		• • • • •
Aug 7	14	ENT (PKS) ARRAIGNMENT: All Defs. except *McCUIN*–S-831 & 832 AUSA S. Dohrmann; Def Cnsls.: D. Foret for *ASCANI*, K. Robison for *GRAY*, R. Whalen for *KALTERMAN*, D. Dubitzky for *MANSOUR*, K. Pflaumer for *MARLER*, B. Wefald for *NEUBAUER* & R. Capitelli for *OLANO*. All Defs advised of charges. All pleads NOT GUILTY to all Cts. charged. Def *MARLER*'s FA placed UNDER SEAL. Def *KALTERMAN* to obtain Local Cnsl ASAP. Trial set 10-14-86 9:30 (BJR) for all Defs. Pret. Conf. set 9-5-86, 10:00 a.m. Pret. MOs due 8-28-86. Bond set @PR for all

DATE	NR	PROCEEDINGS
		Defs. Def *MANSOUR*'s bond not as previously set in LA, but Def may travel in Continent. U.S. & need not report to pret. officer in LA. Arraignment cont'd til 8-14-86 as to Defs *HILLING* to obtain Cnsl & *MANSOUR* to review Indict. All Defs advised of Rule GR (2)
		• • • • •
Aug 14	26	ENT (PKS) ARRAIGNMENT: (cont'd) Def *HILLING* AUSA B. Westinghouse; Def Cnsl T. Kellogg; S-836. Def Cnsl appointed. Def pleads NOT GUILTY to all Cts. Trial set 10-6-86, 9:30 (BJR) Pret. MOs due 8-28-86
Aug 14	27	ENT (PKS) ARRAIGNMENT: (cont'd) Def *MANSOUR* AUSA B. Westinghouse; Def Cnsl J. Zulauf; S-836 Def advised of charges. Def pleads NOT GUILTY to Cts. 2-5, 10-14. Trial set 10-14-86, 9:30 (BJR) Pret. MOs due 8-28-86. Bond remains in effect Pret. conf. set 9-5-86, 10:00 a.m. Status conf. re Cnsl set 8-26-86, 1:30 (PKS) unless Cnsl notifies Clerk
		• • • • •
Oct 20	250	ENT (BJR) HRG.: on Def *OLANO*'s request to represent pro se: AUSA T. Wales/B. Westinghouse; Def Cnsl K. Kanev; CR J. Roth. Court finds Def in need of Cnsl both in Louisiana & this district & Orders Cnsl to be appointed. Def remanded. Cc & Ent. 10-28-86

DATE	NR	PROCEEDINGS
		• • • • •
Nov 20	309	ORDER (BJR) that Def *OLANO* shall file w/Court: Financial Affidavit; supple affidavit identifying circumstances re: retainer of Cnsl in E.D. of NO & explaining whether Def can retain Cnsl in this case; affidavits to be Sealed by Clerk, for review only by Court/order of court. Court will determine eligibility re: app't of Cnsl.
Nov. 20	311	ORDER (BJR) Appointing Cnsl for Def *OLANO*
		• • • • •
Dec 8	336	SUPERSEDING INDICTMENT as to All Defs
		• • • • •
Dec 17	365	ENT (PKS) ARRAIGNMENT: Def *MARLER* AUSA B. Westinghouse; Def Cnasl A. Bentley: S-870. Def advised of charges. Def pleads NOT GUILTY to Cts. I-III & VII. Trial set 2-23-87 (BJR)
Dec 17	366	ENT (PKS) ARRAIGNMENT: Def *HILLING* ASUA B. Westinghouse: Def Cnsl T. Kellogg; S-870. Def adv. of charges. Def pleads NOT GUILTY to Cts. I-III. Trial set 2-23-87 (BJR)
Dec 18	367	ENT (PKS) ARRAIGNMENT: Def *McCUIN* AUSA S. Dohrmann: Def Cnsl F. Leatherman: S-870. Def advised of charges. Def pleads NOT

DATE	NR	PROCEEDINGS
		GUILTY to Cts. 1-17. Trial set 2/23/87 9:30 (BJR)
Dec 18	368	ENT (PKS) ARRAIGNMENT: Def *GRAY* AUSA S. Dohrmann; Def Cnsl J. Wolfe: S-870. Def advised of charges. Def pleads NOT GUILTY to Cts. 1-8. Trial set 2-23-87, 9:30 (BJR)
		• • • • •
1987		
Jan 9	390	WAIVER of Def *OLANO* of Arraignment on Supers. Indict.
		• • • • •
Feb 5	421	ENT (BJR) PRETRIAL CONFERENCE: AUSA R. Westinghouse/T. Wales; Def Cnsls. M. Frost, J. Wolfe, T. Kellogg, B. Wefald, A. Bentley & J. Rawls: CR J. Roth. Cnsl will atteampt to stip. as to Cust. test. Parties to provide 24 hr. notice as to witnesses. Gov't will be allowed 11 peremp. challenges; Defs will have 18. Each side will reserve 1 challenge. In event 1 of jurors has already been excused by conclusion of trial, court will decide which one of remain. 13 jurors to excuse. Jurors will be allowed to take notes. Defs will file joint voir dire & Mtns. in limine. Jury instruct. to be filed no later than 4-9-87. Cnsl to discuss preferences as to photo ID of witnesses & notify court of decision. In Chambers: Court Grants Defs' request for 1 week cont. of trial. Trial

DATE	NR	PROCEEDINGS
		to commence 3-2-87, 9:30 a.m. Cc & Ent. 2-6-87
		• • • • •
Feb 26	453	VOIR DIRE of Defs
		• • • • •
Mar 2	460	VOIR DIRE of Plf.
		• • • • •
Mar 2	464	ENT (BJR) FIRST DAY OF JURY TRIAL
		• • • • •
May 28	649	ENT (BJR) FORTY-SEVENTH DAY OF JURY TRIAL: Defs & Cnsl persent. CR V. Sorensen. Def *NEUBAUER*'s Cnsl absent w/permission. Defs *MARLER* & *GRAY* present clos. arg. Gov't presents rebutt. clos. arg. Court gives jury final instructions before delib. Peremptory challenges. Jury to resume 5-29-87, 9:00 a.m.
		• • • • •
*May 29	684	ENT (BJR) Alternate juror N. Sargent asks to be excused, GRANTED
Jun 3	685	ENT (BJR) VERDICT: Defs & Cnsl absent upon permission. Jury returns verdict: – Def *ASCANI*, NOT GUILTY as to Cts. I, II, III, IV & IX – Def *GRAY*, GUILTY as to Cts. I, II, III, IV, V, VI, VII, & VIII – Def *HILLING*, GUILTY as to Cts. I, NOT GUILTY as to Cts. II & III

DATE	NR	PROCEEDINGS
		– Def *KALTERMAN*, NOT GUILTY as to Cts. I, II, & III
		– Def *MARLER*, NOT GUILTY as to Cts. I, II, III & VII
		– Def *NEUBAUER*, GUILTY as to Ct. 1, NOT GUILTY as to Cts. II & III
		– Def *OLANO*, GUILTY as to Cts. I, II, III, IV, VI, VIII & IX
		Court orders bail revoked as to Def *OLANO*. Sent. set 7-24-87, 9:30 a.m.
Jun 3	686	VERDICT as to Def *GRAY*
Jun 3	687	VERDICT as to Def *HILLING*
Jun 3	688	VERDICT as to Def *NEUBAUER*
Jun 3	689	VERDICT as to Def *ASCANI*
Jun 3	690	VERDICT as to Def *MARLER*
Jun 3	691	VERDICT as to Def *KALTERMAN*
Jun 3	692	VERDICT as to Def *OLANO*
		• • • • •
Jun 16	730	ORDER (BJR) DENYING Defs *HILLING, NEUBAUER, GRAY & OLANO*'s Mtn for Judmnt of Acquit. & Def *GRAY*'s renewed Mtn for Judgmnt of Acquit. Defs *ASCANI, MARLER & KALTERMAN*'s pending Mtns Stricken as moot. Cc & Ent. 6-17-87
		• • • • •
Sep 25	815	ENT (BJR) Def *GRAY* fails to appear for sentencing. Gov't Mtn for Issuance of B/W GRANTED, Issd.
		• • • • •

DATE	NR	PROCEEDINGS
Sep 25	827	ENT (BJR) SENTENCING: Def *OLANO* AUSA R. Westinghouse/T. Wales: Def Cnsl K. Kanev: CR J. Roth.
		Cts. I, IV, & VI – 5 yrs. jail as to each Ct., consecutively to each other & to sent. imposed in Louisiana
		Ct. VIII – 5 yrs. jail concurrent. w/ sent. of Cts. I, IV, VI, & VIII
		Ct. IX – 2 yrs. jail concurrent. w/sent. of Cts. I, IV, VI, & VIII
		Ct. III – Imp. of Sent. Susp.: 5 yrs. Prob.
		Def to be held jointly & severally liable for full restitution amount w/other convicted co-defs. Cnsl to agree to rest. figure. Def's Mtns to strike portions of present. report & for sent. purs. to 18:4205(b)(2) DENIED. Def's Mtn for incarceration @Egland GRANTED. Def advised of right to appeal.
		• • • • •
Sep 30	**	Lodged Notice of Appeal as to Def *OLANO*
		• • • • •
Apr 22	999	ENT (BJR) SENTENCING: Def *GRAY* AUSA R. Westinghouse/T. Wales: Def Cnsl W. Genego: CR V. Sorensen. Court GRANTS Def's Mtn to shorten time to hr. Mtn to amend present. report. Mtn to amend DENIED. court hrs. from Cnsl

DATE	NR	PROCEEDINGS
		15 yrs. jail; Full Restitut. in amount to be determined; $50 mand. assessm. as to Ct. 1 & Cnsl will stipulate to assessm. per Ct.: Prob. period to be assigned purs. to distribution of 15-yr. incarc.
		Def advised of right to appeal. Def Cnsl to submit brief re: restitut. by 5-6-88. Def's Mtn for court recommend. to serve sent. in California institut. GRANTED.
		* * * * *
May 4	1018	NOTICE OF APPEAL Def *GRAY* #88-3096
		* * * * *

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 87-3128, 88-3096 and 88-3295

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GUY W. OLANO, JR., DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RAYMOND M. GRAY, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Western District of Washington

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
	GENERAL DOCKET FOR Ninth Circuit Court of Appeals
Court of Appeals Docket #: 88-3096	Filed: 5/11/88
	USA v. Gray
Appeal from: Western District of Washington (Seattle)	
5/11/88	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL.
5/11/88	Received notification from District Court of payment of docket fee (date paid: 5/6/88) [88-3096] (dmf) [88-3096]
	* * * * *

DATE	PROCEEDINGS
12/29/88	Filed motion of Appellee to consolidate cases 88-3152, 88-3153 and deputy clerk order: (Deputy Clerk: AHH) the Government's motion to consolidate appeal Nos. 88-3152 and 88-3153 is construed as a motion to have them calendared together. Construed as such the motion is granted. [1546338-1] in 88-3152, 88-3153 [88-3152, 88-3153] (mt) [88-3152 88-3153]
	* * * * *
1/27/89	Filed certificate of record on appeal. RT filed in DC 3/14/88 and 6/23/88. [88-3295] (mt) [88-3295]
	* * * * *
2/23/89	FILED CERTIFIED SUPPLEMENTAL RECORD ON APPEAL IN NINE VOLUMES OF PLEADINGS (COPIES); (filed 3/15/88) [88-3152, 88-3153] (jr) [88-3152 88-3153]
	* * * * *
3/3/89	Filed motion of aplt in 88-3295 for stay of briefing schedule and deputy clerk order: (Deputy Clerk: CB) aplt's motion to stay No. 88-3295 is denied. [1572152-1] On its own motion, the court consolidates Nos. 88-3096 & 88-3295. Briefing shall be governed by the 3/1/89 order. (Motion recvd 2/27/89) [88-3096, 88-3295] (jr) [88-3096 88-3295]
	* * * * *
5/25/89	Filed original and 15 copies Appellant Raymond M. Gray opening brief 50 pages, and

DATE	PROCEEDINGS
	five excerpts of record in 1 volumes; served on 5/22/89 [88-3096, 88-3295] (dmf) [88-3096 88-3295]
	* * * * *
7/7/89	Filed original and 15 copies appellee USA's 50 pages brief, 0 Exc. vols: ; served on 7/3/89 [88-3096, 88-3295] (dmf) [88-3096 88-3295]
	* * * * *
7/20/89	Filed original and 15 copies Raymond M. Gray's reply brief, 25 pages, served on 7/19/89 [88-3096, 88,3295] (mt) [88-3096 88-3295]
	* * * * *
1/12/90	CALENDARED: SE 3/5/90 1:30 p.m. [88-3096, 88-3295] (rk) [88-3096 88-3295]
	* * * * *
3/5/90	ARGUED AND SUBMITTED TO: WRIGHT, REINHARDT, O'SCANNLAIN [88-3096, 88-3295] (jlc) [88-3096 88-3295]
3/7/90	Filed order (Deputy Clerk: JLC) Submission is vacated pending further order of the court. [88-3096, 88-3295] (dmf) [88-3096 88-3295]
	* * * * *
9/19/90	Filed order (WRIGHT, REINHARDT, O'SCANNLAIN,): We vacated submission in these cases so that #87-3128 could be remanded to the DC for the limited purpose of allowing Judge Rothstein to rule on Olano's motion for a modification of his sentence. Judge Rothstein granted that motion on 5/14/90. We hereby resubmit both cases, and consolidate them for disposition in this court. [87-3128,

DATE	PROCEEDINGS
	88-3096, 88-3295] (rv) [87-3128 88-3096 88-3295]
9/19/90	Case resubmitted on this date to WRIGHT, REINHARDT, O'SCANNLAIN. (See previous deferral of submission.) [87-3128, 88-3096, 88-3295] (rv) [87-3128 88-3096 88-3295]
	* * * * *
5/31/91	FILED OPINION: REVERSED IN PART; VACATED IN PART AND REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. WRIGHT; REINHARDT, author; O'SCANNLAIN.) FILED AND ENTERED JUDGMENT. [88-3096] (sys) [88-3096]
6/11/91	Filed motion of aple and order: (Deputy Clerk: jvr) aple is granted extension of time until 7/15/91 to file its petition for rehearing. [1945031-1] in 87-3128, in 88-3096, in 88-3295; in 87-3128, 88-3096, 88-3295, (Motion recvd 6/10/91) [87-3128, 88-3096, 88-3295] (jr) [87-3128 88-3096 88-3295]
6/12/91	Filed Appellant Raymond M. Gray in 88-3096's opposition to (Govt's Req to Ext time for filing Rhrg Petition & RFeq for Fuling on Pending Motion for Release of Defendant on Bail Nunc Pro Tunc, served on 6/11/91 (PANEL) [88-3096, 87-3128] (mhf) [87-3128 88-3096]
6/14/91	[1950383] Filed original and 3 copies Appellant Raymond M. Gray in 88-3096 & 88-3295; petition for rehearing, (PANEL) 7 p. pages, served on 6/12/91 [88-3096, 88-3295] (mhf) [88-3096 88-3295]

DATE	PROCEEDINGS
6/20/91	Filed order (Eugene A. WRIGHT, Stephen R. REINHARDT, Diarmuid F. O'SCANNLAIN,): The motion of aplt Gray filed on 5/3/91 to modify order granting personal recognizance, etc., is referred to the DC for its consideration & any action it deems appropriate. This order shall constitute a limited remand for the purpose specified above. [88-3096, 88-3295] (mhf) [88-3096 88-3295]
7/15/91	[1963283] Filed original and 40 copies Appellee's (USA) petition for rehearing with suggestion for rehearing en banc. (PANEL AND ALL ACTIVE JUDGES) 15 p.pages, served on 7/13/91 [87-3128, 88-3096, 88-3295] (tsp) [87-3128 88-3096 88-3295]
7/19/91	Filed order (Eugene A. WRIGHT, Stephen R. REINHARDT, Diarmuid F. O'SCANNLAIN,): denying petition for rehearing [1950383-1] in 88-3096, 88-3295 [88-3096, 88-3295] (mhf) [88-3096 88-3295]
7/24/91	Filed order (Eugene A. WRIGHT, Stephen R. REINHARDT & Diarmuid F. O'SCANNLAIN) defendants are requested to file a response to the Petition for Rehearing with Suggestion for Rehearing En banc filed 7/15/91, in the above cause. The response shall be filed with the court within 21 days from the date of this order and shall not exceed 15 pages in length. [87-3128, 88-3096, 88-3295] (jr) [87-3128 88-3096 88-3295]
8/14/91	Filed aplt's motion for an extension of time to file response to petition for rehearing & suggestion for rehearing en banc to 8/19/91;

DATE	PROCEEDINGS
	[1981337] served on 8/12/91 to (PANEL). [88-3096] [88-3096] (jr) [88-3096]
8/21/91	Filed Appellant's opposition to Aplee's petition for rehearing w/suggestion for rehearing en banc in response to court's order of 7/24/91 [1967549-1] served on 8/19/91 (PANEL & all active judges) (mhf) [88-3096 88-3295]
8/23/91	Filed order (Deputy Clerk: jc) Aplt's motion for an extension of time to file response to got's petition for rehearing g & suggestion for rehearing en banc from 8/14/91 to 8/19/91 is granted. [88-3096, 87-3128] (mhf) [87-3128 88-3096]
10/18/91	Filed order (Eugene A. WRIGHT, Stephen R. REINHARDT & Diarmuid F. O'SCANNLAIN) the petition for rehearing is denied and the suggestion for rehearing en banc is rejected. [1963283-1] in 87-3128, 88-3096, 88-3295 [87-3128, 88-3096, 88-3295] (jr) [87-3128 88-3096 88-3295]
	* * * * *
12/10/91	MANDATE ISSUED [87-3128, 88-3096, 88-3295] (mhf) [87-3128 88-3096 88-3295]
12/10/91	MANDATE ISSUED [87-3128, 88-3096, 88-3295] (mhf) [88-3096 88-3295]
	* * * * *

DATE	PROCEEDINGS
6/1/92	Received notice from Supreme Court, petition for certiorari GRANTED on 05/18/92 (sm) [87-3128 88-3096]

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS

GENERAL DOCKET FOR
Ninth Circuit Court of Appeals

Court of Appeals Docket #: 88-3295 Filed: 12/14/88

USA v. Gray

Appeal from: Western District of Washington (Seattle)

12/14/88 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL.

• • • • •

12/29/88 Filed motion of Appellee to consolidate cases 88-3152, 88-3153 and deputy clerk order: (Deputy Clerk: AHH) the Government's motion to consolidate appeal Nos. 88-3152 and 88-3153 is construed as a motion to have them calendared together. Construed as such the motion is granted. [1546338-1] in 88-3152, 88-3153 [88-3152, 88-3153] (mt) [88-3152 88-3153]

• • • • •

1/27/89 Filed certificate of record on appeal. RT filed in DC 3/14/88 and 6/23/88. [88-3295] (mt) [88-3295]

3/3/89 Filed motion of aplt in 88-3295 for stay of briefing schedule and deputy clerk order: (Deputy Clerk: CB) aplt's motion to stay No. 88-3295 is denied. [1572152-1] On its own motion, the court consolidates Nos. 88-3096 & 88-3295. Briefing shall be governed by the 3/1/89 order. (Motion recvd 2/27/89) [88-3096, 88-3295] (jr) [88-3096 88-3295]

DATE	PROCEEDINGS

• • • • •

5/25/89 Filed original and 15 copies Appellant Raymond M. Gray opening brief 50 pages, and five excerpts of record in 1 volumes; served on 5/22/89 [88-3096, 88-3295] (dmf) [88-3096 88-3295]

• • • • •

7/7/89 Filed original and 15 copies appellee USA's 50 pages brief, 0 Exc. vols: ; served on 7/3/89 [88-3096, 88-3295] (dmf) [88-3096 88-3295]

7/20/89 Filed original and 15 copies Raymond M. Gray's reply brief, 25 pages, served on 7/19/89 [88-3096, 88,3295] (mt) [88-3096 88-3295]

• • • • •

1/12/90 CALENDARED: SE 3/5/90 1:30 p.m. [88-3096, 88-3295] (rk) [88-3096 88-3295]

• • • • •

3/5/90 ARGUED AND SUBMITTED TO: WRIGHT, REINHARDT, O'SCANNLAIN [88-3096, 88-3295] (jlc) [88-3096 88-3295]

3/7/90 Filed order (Deputy Clerk: JLC) Submission is vacated pending further order of the court. [88-3096, 88-3295] (dmf) [88-3096 88-3295]

• • • • •

9/19/90 Filed order (WRIGHT, REINHARDT, O'SCANNLAIN,): We vacated submission in these cases so that #87-3128 could be remanded to the DC for the limited purpose of allowing Judge Rothstein to rule on Olano's motion for a modification of his sentence. Judge Rothstein granted that motion on 5/14/90. We

DATE	PROCEEDINGS
	hereby resubmit both cases, and consolidate them for disposition in this court. [87-3128, 88-3096, 88-3295] (rv) [87-3128 88-3096 88-3295]
9/19/90	Case resubmitted on this date to WRIGHT, REINHARDT, O'SCANNLAIN. (See previous deferral of submission.) [87-3128, 88-3096, 88-3295] (rv) [87-3128 88-3096 88-3295]
12/7/90	Filed order (WRIGHT, REINHARDT, O'SCANNLAIN): It is ordered that the motion of defendant-appellant for release on bond is granted and we remand to the DC for the limited purpose of entering an appropriate order releasing him on his personal recognizance and such other conditions as the DC judge may deem appropriate. [88-3096, 88-3295] (rv)
	* * * * *
5/31/91	FILED OPINION: REVERSED IN PART; VACATED IN PART AND REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. WRIGHT; REINHARDT, author; O'SCANNLAIN.) FILED AND ENTERED JUDGMENT. [88-3096] (sys) [88-3096]
6/11/91	Filed motion of aple and order: (Deputy Clerk: jvr) aple is granted extension of time until 7/15/91 to file its petition for rehearing. [1945031-1] in 87-3128, in 88-3096, in 88-3295; in 87-3128, 88-3096, 88-3295, (Motion recvd 6/10/91) [87-3128, 88-3096, 88-3295] (jr) [87-3128 88-3096 88-3295]

DATE	PROCEEDINGS
	* * * * *
6/20/91	Filed order (Eugene A. WRIGHT, Stephen R. REINHARDT, Diarmuid F. O'SCANNLAIN,): The motion of aplt Gray filed on 5/3/91 to modify order granting personal recognizance, etc., is referred to the DC for its consideration & any action it deems appropriate. This order shall constitute a limited remand for the purpose specified above. [88-3096, 88-3295] (mhf) [88-3096 88-3295]
	* * * * *
7/15/91	[1963283] Filed original and 40 copies Appellee's (USA) petition for rehearing with suggestion for rehearing en banc. (PANEL AND ALL ACTIVE JUDGES) 15 p.pages, served on 7/13/91 [87-3128, 88-3096, 88-3295] (tsp) [87-3128 88-3096 88-3295]
	* * * * *
7/24/91	Filed order (Eugene A. WRIGHT, Stephen R. REINHARDT & Diarmuid F. O'SCANNLAIN) defendants are requested to file a response to the Petition for Rehearing with Suggestion for Rehearing En banc filed 7/15/91, in the above cause. The response shall be filed with the court within 21 days

DATE	PROCEEDINGS
	from the date of this order and shall not exceed 15 pages in length. [87-3128, 88-3096, 88-3295] (jr) [87-3128 88-3096 88-3295]
8/21/91	Filed Appellant's opposition to Aplee's petition for rehearing w/suggestion for rehearing en banc in response to court's order of 7/24/91 [1967549-1] served on 8/19/91 (PANEL & all active judges) (mhf) [88-3096 88-3295]
10/18/91	Filed order (Eugene A. WRIGHT, Stephen R. REINHARDT & Diarmuid F. O'SCANNLAIN) the petition for rehearing is denied and the suggestion for rehearing en banc is rejected. [1963283-1] in 87-3128, 88-3096, 88-3295 [87-3128, 88-3096, 88-3295] (jr) [87-3128 88-3096 88-3295]
	• • • • •
12/10/91	MANDATE ISSUED [87-3096, 88-3295] (mhf) [88-3295]
12/10/91	MANDATE ISSUED [87-3128, 88-3096, 88-3295] (mhf) [87-3128 88-3096 88-3295]
12/10/91	MANDATE ISSUED [87-3128, 88-3096, 88-3295] (mhf) [88-3096 88-3295]
	• • • • •

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS

GENERAL DOCKET FOR
Ninth Circuit Court of Appeals

Court of Appeals Docket #: 87-3128 Filed: 10/15/87

USA v. Olano, et al

Appeal from: Western District of Washington (Seattle)

10/15/87	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL..
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3/16/88	Received certificate of record. RT filed in DC 3/14/88 Late, referred to CRIMATT. [87-3128] (dmf) [87-3128]
3/24/88	Filed order (Deputy Clerk: MLM) The certificate of record is ordered filed. This order does not waive the mandatory fee reduction for any portion of the RTs delivered late. Aplt's opening brief is due 4/25/88, aplee's brief is due 5/23/88, and the optional reply brief is due 6/6/88. [87-3128] (dmf) [87-3128]
3/24/88	Filed as of 3/16/88 certificate of record on appeal. RT filed in DC 3/14/88 [87-3128] (dmf) [87-3128]

DATE	PROCEEDINGS
8/16/88	Filed, as of 05/02/88, certified record on appeal in 91 Vols. (total): 24 Clerks Rec 67 RTs (Original) [87-3121, 87-3128, 87-3123, 87-3122, 87-3131] [87-3121, 87-3128, 87-3123, 87-3122, 87-3131] (sm) [87-3121 87-3122 87-3123 87-3128 87-3131]
8/26/88	FILED, AS OF 8/15/88, CERTIFIED TRANSCRIPT OF RECORD ON APPEAL IN ONE VOLUME OF RTs (ORIGINAL). ONE BOX OF EXHIBITS (17 volumes of original transcripts). [88-3152, 88-3153] [88-3152, 88-3153] (jr) [88-3152 88-3153]
10/14/88	Filed order (Deputy Clerk: AW) for purposes of oral argument, USA v. Zaki Manour, CA No. 87-3131 is severed from the above and shall be scheduled separately on the calendar. This case, No. 87-3131 will be allotted thirty minutes per side for oral argument. Appellant Mansour's motion for submission of the appeal is Denied. The Hilling and Neubauer appeals shall be heard together as scheduled. [87-3121, 87-3123, 87-3131] (PANEL) (mt) [87-3121 87-3123, 87-3131]
12/29/88	Filed motion of Appellee to consolidate cases 88-3152, 88-3153 and deputy clerk order: (Deputy Clerk: AHH) the Government's motion to consolidate appeal Nos. 88-3152 and 88-3153 is construed as a motion to have them calendared together. Construed as such the motion is granted. [1546338-1] in 88-3152, 88-3153 [88-3152, 88-3153] (mt) [88-3152 88-3153]

DATE	PROCEEDINGS
	* * * * *
1/27/89	Filed certificate of record on appeal. RT filed in DC 3/14/88 and 6/23/88. [88-3295] (mt) [88-3295]
2/23/89	FILED CERTIFIED SUPPLEMENTAL RECORD ON APPEAL IN NINE VOLUMES OF PLEADINGS (COPIES); (filed 3/15/88) [88-3152, 88-3153] (jr) [88-3152 88-3153]
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5/5/89	Filed Appellant Guy W. Olano's motion to recall appointed counsel and to allow movant to proceed pro se and application for release and order for an appeal bond. (CRIMATT) on 5/3/89 [1602026] [87-3128] [87-3128] (mt) [87-3128]
	* * * * *
7/6/89	Received Appellant Guy W. Olano in 87-3128's brief in 4 copies of 144 pages, and 5 excerpts; oversize, copy to ProMo w/motion to file; Served on 6/30/89 [87-3128] (dmf) [87-3128]
	* * * * *
9/8/89	Filed original and 4 copies Appellant Guy W. Olano in 87-3128 opening brief 73 pages, and five excerpts of record in 1 volumes; served on 9/5/89 [87-3128] (dmf) [87-3128]

DATE	PROCEEDINGS
9/11/89	Rec'd revised index to excerpts to aplt's opening brief. (RECORDS UNIT) [87-3128] (dmf) [87-3128]
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11/21/89	Filed original and 15 copies appellee USA in 87-3128's 75 pages brief, ; served on 11/17/89 [87-3128] (ec) [87-3128]
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12/5/89	Filed original and 4 copies Guy W. Olano in 87-3128 reply brief, 19 pages, served on 11/30/89 [87-3128] (dmf) [87-3128]
12/6/89	Received original and 4 copies Appellant Guy W. Olano in 87-3128 supplemental opening brief of 4 pages, served on 12/5/89; copy to ProMo with motion to file. [87-3128] (dmf) [87-3128]
1/5/90	Filed motion of Appellant Guy W. Olano in 87-3128 file supplemental brief and deputy clerk order: (Deputy Clerk: CB) Aplt's motion to file a suppl. brief is granted. The brief rec'd 12/6/89 shall be filed. The Government may file a supp. brief in response to aplt's suppl. brief. The Government's brief shall not exceed 5 pages in length and shall be due 2/1/90. The clerk shall calendar this appeal as soon as practicable. Subject to reconsideration. [1698270-1] (Motion recvd 12/6/89) [87-3128] (dmf) [87-3128]
1/5/90	Filed original and 4 copies Appellant Guy W. Olano in 87-3128 supplemental brief of 4 pages, served on 12/5/89 [87-3128] (dmf) [87-3128]

DATE	PROCEEDINGS
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1/12/90	CALENDARED: SE 3/5/90 1:30 p.m. [87-3128] (rk) [87-3128]
	* * * * *
3/5/90	SUBMITTED ON THE BRIEFS TO: WRIGHT, REINHARDT, O'SCANNLAIN [87-3128] (jlc) [87-3128]
3/7/90	Filed order (Deputy Clerk: JLC) Submission is vacated pending further order of the court. [87-3128] (dmf) [87-3128]
3/20/90	Filed order (WRIGHT, REINHARDT & O'SCANNLAIN) this case is remanded to the district court for the limited purpose of allowing the district judge to consider aplt's motion for reduction and/or modification of sentence. [1725524-1] The district court is requested to advise this panel as soon as the motion has been acted upon. [87-3128] (jr) [87-3128]
	* * * * *
9/19/90	Filed order (WRIGHT, REINHARDT, O'SCANNLAIN,): We vacated submission in these cases so that #87-3128 could be remanded to the DC for the limited purpose of allowing Judge Rothstein to rule on Olano's motion for a modification of his sentence. Judge Rothstein granted that motion on 5/14/90. We hereby resubmit both cases, and consolidate them for disposition in this court. [87-3128, 88-3096, 88-3295] (rv) [87-3128 88-3096 88-3295]

DATE	PROCEEDINGS
9/19/90	Case resubmitted on this date to WRIGHT, REINHARDT, O'SCANNLAIN. (See previous deferral of submission.) [87-3128, 88-3096, 88-3295] (rv) [87-3128 88-3096 88-3295]
11/2/90	Filed order (WRIGHT, REINHARDT, O'SCANNLAIN): It is ordered that the motion of defendant-appellant for release on bond is granted and we remand to the DC for the limited purpose of entering an appropriate order releasing him on his personal recognizance and such other conditions as the DC judge may deem appropriate. [1805544-1] [87-3128] (dmf) [87-3128]
3/22/91	FILED CERTIFIED SUPPLEMENTAL RECORD ON APPEAL IN FIVE VOLUMES. PLDGS in 3 Vols; RTs in 2 Vols. (orig record filed on 3/16/88). RECORD NOW IN 96 VOLUMES. [87-3128] (jr) [87-3128]
5/31/91	FILED OPINION: REVERSED IN PART; VACATED IN PART AND REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. WRIGHT; REINHARDT, author; O'SCANNLAIN.) FILED AND ENTERED JUDGMENT. [88-3096] (sys) [88-3096]
	* * * * *
6/11/91	Filed motion of aple and order: (Deputy Clerk: jvr) aple is granted extension of time until 7/15/91 to file its petition for rehearing. [1945031-1] in 87-3128, in 88-3096, in 88-3295;

DATE	PROCEEDINGS
	in 87-3128, 88-3096, 88-3295, (Motion recvd 6/10/91) [87-3128, 88-3096, 88-3295] (jr) [87-3128 88-3096 88-3295]
	* * * * *
7/15/91	[1963283] Filed original and 40 copies Appellee's (USA) petition for rehearing with suggestion for rehearing en banc. (PANEL AND ALL ACTIVE JUDGES) 15 p.pages, served on 7/13/91 [87-3128, 88-3096, 88-3295] (tsp) [87-3128 88-3096 88-3295]
7/24/91	Filed order (Eugene A. WRIGHT, Stephen R. REINHARDT & Diarmuid F. O'SCANNLAIN) defendants are requested to file a response to the Petition for Rehearing with Suggestion for Rehearing En banc filed 7/15/91, in the above cause. The response shall be filed with the court within 21 days from the date of this order and shall not exceed 15 pages in length. [87-3128, 88-3096, 88-3295] (jr) [87-3128 88-3096 88-3295]
8/14/91	Filed Appellant Guy W. Olano in 87-3128's response to petition opposing petition for en-banc rehearing [1963283-1] served on 8/12/91 (PANEL & ALL ACTIVE JUDGES). [87-3128] (mt) [87-3128]
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10/18/91	Filed order (Eugene A. WRIGHT, Stephen R. REINHARDT & Diarmuid F. O'SCANNLAIN) the petition for rehearing is denied and the suggestion for rehearing en banc is rejected. [1963283-1] in 87-3128, 88-3096, 88-3295 [87-3128, 88-3096, 88-3295] (jr) [87-3128 88-3096 88-3295]

DATE	PROCEEDINGS
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12/10/91	MANDATE ISSUED [87-3128, 88-3096, 88-3295] (mhf) [87-3128 88-3096 88-3295]
	* * * * *
6/1/92	Received notice from Supreme Court, petition for certiorari GRANTED on 05/18/92 (sm) [87-3128 88-3096]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. CR86-202R

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

JOSEPH ASCANI, ET AL., DEFENDANTS.

TRANSCRIPT OF PROCEEDINGS in the above-entitled and -numbered cause, before the Honorable Barbara J. Rothstein, United States District Court Judge, on February 5, 1987.

[2] THE CLERK: CR 86-202R, United States versus Joseph Ascani, et al. Counsel, will you please step forward and make your appearances.

MR. WESTINGHOUSE: May it please the Court, appearing on behalf of the United States Robert Westinghouse and Thomas Wales.

MR. FROST: Good morning, Your Honor, Mike Frost appearing on behalf of Mr. Ascani.

MR. WOLFE: John Wolfe and Kent Robison on behalf of Mr. Gray.

MR. BENTLEY: Al Bentley representing Brian Marler.

MR. KELLOGG: Terrence Kellogg for defendant Davy Hilling, Your Honor.

MR. WEFALD: Bob Wefald representing David Neubauer.

MR. RAWLS: Good morning, Your Honor. John Rawls from New Orleans representing Mr. Stewart Kalterman.

MR. BENTLEY: Your Honor, Mr. Kanev is not able to be here, he's on a trial in state court and I believe Mr. Wolfe will speak for him.

THE COURT: Okay.

MR. WESTINGHOUSE: Your Honor, perhaps as a means of proceeding this morning I should advise the Court that the United States and most counsel met yesterday afternoon to attempt to work out some of the pregame festivities and we have been successful in that regard as to at least some matters [3] that I would think it might be appropriate to advise the Court of at this time.

THE COURT: Why don't you because it will probably help me go down my check list and hopefully cross a number of things off.

MR. WESTINGHOUSE: All right. The first issue that we talked about was the stipulation with respect to some of the custodial witnesses that might be expected in a case of this sort. I think it's fair to say that we have reached an agreement in that regard with respect to the introduction without foundation of business records.

I should advise the Court that two counsel were not able to attend last night and so with respect to counsel for Mr. Ascani and counsel for Mr. Kalterman we do not as yet have their concurrence. But all other counsel have indicated and in fact have signed a stipulation, so it appears as though at least with respect to the majority that's in place.

THE COURT: Well, it doesn't work unless—unfortunately you don't save any time if you have to put the same witness on, so let's find out right now, Mr. Frost—yes, there you are.

MR. FROST: Yes, Your Honor. I just received a copy of the revised stipulation this morning and have not had

an opportunity to talk with my client about it or even review it. What I would propose—I'm assuming that since other counsel [4] have signed off on this that it's unlikely that there is any major prejudice to my client that would result from this, but what I would propose is that I get an answer to the Court and also to Mr. Westinghouse by Monday, if that would be permissible, in terms of the stipulation.

THE COURT: That would be fine. It will really, I think, make a tremendous difference. I think it will make a tremendous difference in the length of the trial.

Counsel, have you had a chance to review it?

MR. RAWLS: Yes, I have, Your Honor, and not to be the skunk of a lawn party, but I am going to have some real problems with that, which is based on the different nature of my client's alleged involvement in these schemes. I also can get an answer to the Court by telephone on Monday, to be followed up by written pleadings.

THE COURT: Oh, you don't have to follow it up by written pleadings, do you, counsel?

MR. RAWLS: Well, if I'm going to sign, I certainly will be following it up with a—

THE COURT: Oh, if you're going to—

MR. RAWLS: Yes, ma'am. I'm keeping the door open at this point, but I do need to confer with my client and I do have some problems with it, quite frankly.

THE COURT: Counsel, I'd like to know from you specifically—if you decide not to sign, I'm going to want to [5] know specifically on the record what your problems are and I want to know exactly what you anticipate your cross-examination of these witnesses will be, because I anticipate we're talking in a case of this nature of adding perhaps a week or two to the trial for these witnesses to arrive, and if it turns out that all of these witnesses are brought here and they take the stand and indeed you ask no questions, I just want to let you know that the Court

will take a dim view of that. That has been my experience in the past, that for custodial witnesses – in fact, with most of these witnesses it turns out that there is little or no meaningful cross-examination.

MR. RAWLS: Your Honor, that's not the way I practice law and I would not object across the board in the first place, but only to the ones affecting Alliance Federal.

Secondly, I think I have a good reason, that is, that my man as head of Alliance Service was dealing with a large volume of very big loan files and if the jury is given the misimpression that these are the only very big files that he dealt with that could be detrimental to my client.

Obviously he can testify as to that point, but if the custodial person brought in from Alliance Federal were to put these few files in the larger context of what my man was doing on a regular basis it may make a difference. That is the reason that I will object, if I do, but I honestly do not know if I'm going to object or not at this point.

[6] THE COURT: Okay. Maybe even then if you do you could find one custodial witness who could then serve you as a witness to testify as to the volume of the files and then you might –

MR. RAWLS: Yes, ma'am. As to the rest of it, telephone records and so forth, I have no objection. It's just that one particular area and I hope the Court doesn't think that I'm being frivolous in even saying what my reason is.

THE COURT: No. Now that I hear the reason I can see a good reason for it, but I also think that maybe we can narrow the scope of the objection considerably.

MR. RAWLS: What happens on the others is beyond the scope of my concern.

THE COURT: Okay.

MR. RAWLS: Thank you, ma'am.

MR. WESTINGHOUSE: Your Honor, I should preface perhaps the remainder of my statements with the

note that I think is already clear, that it applies to an agreement between all counsel who were present yesterday afternoon and both Mr. Rawls and Mr. Frost were not present. Mr. Frost, I understand, was in trial. I can't speak for Mr. Rawls.

We discussed secondly the matter of reciprocal discovery and the matter of the provision of Jencks material and Brady material. The United States and counsel agree that upon the provision from defense of reciprocal discovery or a [7] written statement that they had no reciprocal discovery or that what they were providing was all that they had the United States would then be prepared to vary from the requirements of the Jencks Act.

Specifically, we indicated the plan to provide to counsel on the Monday of the week preceding the appearance of the witnesses for that week all of the Jencks material. To make that a bit clearer we would anticipate, for instance, on Monday, February 16th, providing all Jencks material for witnesses that would be appearing during the week of February 23rd and so on through the course of the trial.

We have chosen Monday to allow ourselves the opportunity to have the weekend to prepare copies if we are behind at that time.

THE COURT: Implicit in that arrangement, of course, is that you are also providing the names of the witnesses for that week, is that correct?

MR. WESTINGHOUSE: That is correct, Your Honor.

THE COURT: I mean you'd have to be.

MR. WESTINGHOUSE: Yes.

THE COURT: And are you providing it in an order that will at least – I mean, given the trials and tribulations that occur to witness lists during trial, but it at least will follow the order that you anticipate, say, Monday, Tuesday, Wednesday, Thursday, Friday?

[8] MR. WESTINGHOUSE: We hadn't expected to do that, we had expected to provide it in alphabetical order, Your Honor, for the witnesses for the week. We certainly I don't think have any problem in giving a rough idea on the Friday afternoon or the Monday when we provide the documents as to the approximate order of witnesses.

THE COURT: Yes, again with the understanding that the vicissitudes of trial may mean changing. I think it helps everyone if the night before they can pull the documents for the witnesses that are coming on the next day and there is not this mad rush to get the relevant documents when you announce the witness. I'd expect it would be reciprocal in defendants' case going back. But rather than alphabetical order it may be more helpful to give it in a day order.

MR. WESTINGHOUSE: I don't see any problem in doing that or at least in the advising counsel as to the anticipated order of witnesses. We are certainly willing to do that. We also added to the offer to provide as Jencks material on a voluntary basis the stipulation, and that was that counsel to whom we provided the Jencks material would sign an agreement that they would not provide the Jencks material or the opportunity to review Jencks material to other counsel who had not agreed to provide us with reciprocal discovery pursuant to Rule 16. All counsel present at the meeting indicated that they were willing to abide by that restriction on our voluntary [9] production of Jencks material.

THE COURT: It sounds like such a helpful arrangement I can't imagine that Mr. Frost and Mr. Rawls wouldn't be going along with it. Is that one that you need to talk over with your clients or can you give the Court a feel for your response at this point?

MR. RAWLS: Why can't we just get it all up front? Why are we just being given it one week at a time?

THE COURT: Because they don't even have to give it to you at all, is the answer, and this is a compromise they've worked out. The Court is certainly not going to get involved in it. All I really need to know is are you and Mr. Frost going to go along with the arrangement?

MR. FROST: Sounds okay to me, Your Honor.

THE COURT: Mr. Rawls?

MR. RAWLS: Yes, ma'am.

MR. FROST: As I understand it we will have at least a weekend prior to the witnesses testifying; under the arrangement it's going to be provided seven days in advance.

THE COURT: Yes, it's the Monday of the following week, not the Monday of the week. So you'll have seven days.

MR. FROST: That week and then the weekend.

THE COURT: Yes.

MR. FROST: That's fine.

THE COURT: Okay with you, Mr. Rawls?

[10] MR. RAWLS: Yes, ma'am.

MR. WESTINGHOUSE: Your Honor, I should indicate, and I think all counsel understand, that we had intended this to be a good faith effort to make production and we pointed out because of the volume of materials there certainly may come the time when we have omitted something in that production. We will make every effort not to do that, but we did add that it's a good faith attempt to provide Jencks Act material in advance and I think everyone understood that.

THE COURT: Okay. Counsel, you know, this is meant to facilitate. If we get hung up on the mistakes that are bound to take place on both sides, it's just going to be—make the trial even more difficult than it already promises to be, and I think good faith on both sides is going to be assumed by the Court and everyone.

MR. WESTINGHOUSE: Thank you, Your Honor. The next thing we talked about were exhibits and the production of exhibits. We indicated to counsel that it is our intent to have a complete set of binders of all exhibits for each counsel and for the Court. Because of the burden of preparing those we have indicated that it may very well not be until the morning of trial or shortly, therefore, before that that we will have those ready. We have indicated we will try and have at least a rough draft of the full exhibit list available during the week before so that all counsel will have the opportunity to review [11] that and at least familiarize themselves as to the way we have set up the exhibit marking.

THE COURT: Can't quarrel with that arrangement. It sounds extremely reasonable. Of course if you do get it done earlier I'm sure they'd appreciate it earlier.

MR. WESTINGHOUSE: I understand and we will make that effort. It is we are finding a very difficult task to assemble the binders.

THE COURT: I would assume it would be given the nature of the case. I think it's probably a monumental task. Did you give any thought in this as to how the exhibits will be shown at trial? Did you reach that question?

MR. WESTINGHOUSE: We didn't talk about that. Mr. Wales and I have, however, talked about that and we envisioned that we would be making liberal use of an overhead projector with the Court's permission. In fact, we were chatting just before the Court took the Bench about an appropriate position for the projector and screen and perhaps the Court has had experience before, but one thought that we had was that perhaps the screen would be most appropriately placed toward the rear of the area just in front of the bench, set of benches and the projector then would be somewhere in the area of the far corner of the plaintiff's counsel table.

THE COURT: Sounds good. The problem with the setup of this courtroom is that it's hard to find a place where the [12] jury can see it and where opposing counsel can see it. And that seems to be—the only other alternative is to put the screen there and the projector there and—

MR. WESTINGHOUSE: The thought that we had in that regard, Your Honor, is perhaps that would be a greater interference with the jury in passing to and from the jury room. We also took note of the fact that since each counsel will have a set of their own copies of the documents it might to some extent lessen the need to look up at the screen itself because we would envison that each counsel would have the document in front of them that is being pictured on the screen.

THE COURT: No. The problem getting to and from the jury room is if you put the screen there, not there, because they go to the jury room out that way.

MR. WESTINGHOUSE: Oh, I'm sorry, I thought the jury was back there.

THE COURT: No. This is the only courtroom that has the jury room on the same floor. It's right back there.

MR. WESTINGHOUSE: Perhaps it would be most appropriate if there would be an opportunity at some point before trial that Mr. Wales and I could simply bring the screen and projector over and set it up and see what quality of picture—

THE COURT: All I ask is that you really do use the overhead projector. It's not a matter of permission from the [13] Court. It's a matter of request from the Court. I think the time involved in passing exhibits to the jury in a case like this can get substantial and really make a dent in trial time.

MR. WESTINGHOUSE: That's certainly been our practice in the past and our intent in this case, with the possible exception of somewhat voluminous documents,

where there may very well be simply a need to allow the jury to see the entire document for one reason or another. I don't think that will happen very often.

The next matter that we discussed, Your Honor, was the matter of jury selection and peremptories and I can report to the Court that at least among parties that were present we reached two agreements, subject, of course, to the Court's approval. The first of which was that counsel agreed that in terms of peremptories that it would be appropriate because of the number of defendants to ask the Court for some additional peremptories and we agreed that an appropriate number would be 17 for the defense and 10 for the United States, subject again to the two counsel who were not present.

We also agree among those that were present that all were in favor, I believe I'm representing accurately, to the simultaneous challenge to the entire panel at the conclusion of the voir dire.

THE COURT: What about alternates? Did you talk about alternates?

[14] MR. WESTINGHOUSE: We did not talk about alternates, Your Honor. I think it would be appropriate to talk in terms of perhaps three or four alternates given the potential length of trial.

THE COURT: Why don't we start with—it's not like you can get another one in the middle. How about three and take our chances? Is that all right with everyone?

MR. WEFALD: Yes.

MR. BENTLEY: Your Honor, would there be a challenge—a peremptory with respect to each of the additional alternates to be selected?

THE COURT: How about one challenge for all the alternates, move this up to 18 and 11.

MR. WESTINGHOUSE: That's fine, Your Honor.

THE COURT: Is that okay? You agreed on 17 and 10 before you discussed alternates. All I'm suggesting is 18 and 11 for the three alternates?

MR. FROST: So do we only have one peremptory challenge for all three alternates.

THE COURT: You know how we do it here. Three alternates are included—

MR. BENTLEY: That would be done at the same time that the 12 are selected and not after the 12 have been determined?

THE COURT: If it's all right with you—let me explain it, especially for those counsel who haven't gone [15] through our voir dire, the way I prefer to do it is take the whole panel and go at it as if you're choosing 15 jurors, okay, and then you'd have 18 and 11 to select 15 jurors and in fact one of the things we might discuss—you don't mind my breaking up your presentation—

MR. WESTINGHOUSE: No, Your Honor.

THE COURT: —with some of these. One of the things we might discuss is often some counsel feel there is a certain advisability to not even telling—wait a minute. Certain advantage to having 14—to having two alternates in this particular courtroom. It would be really comfortable for them to stick with the seating arrangement there. It's a chance, counsel, and I guess the thing I'd ask you is would you be willing to go with 11 if we did run through both alternates? I don't want that to be grounds—you know, it is a long trial. I don't know what we're talking about with trial now. If we get the custodial witnesses out of the picture, what is the government's estimate of their case at this point?

MR. WESTINGHOUSE: Your Honor, I think Mr. Wales and I are having some difficulty with that question.

THE COURT: Does that mean you can't agree?

MR. WESTINGHOUSE: We can't agree, that's correct. Our best estimate I think is somewhere in the neighborhood of six to seven weeks for the presentation of the United States' case.

[16] THE COURT: Well, that's better than other estimates I've heard at various times. Six to seven weeks. I think we could try two alternates, but I'd like to know if counsel would go with 11 if – or do you need time to think about it or talk to your clients about it – if we did run through two alternates and then something happened.

MR. ROBISON: Your Honor, on behalf of Mr. Gray, my name is Kent Robison, I would respectfully request that we go with 15 rather than 11 for a verdict.

THE COURT: Where are you going to put them, counsel? See, I would be willing to go with 15, too, but the problem is – the suggestion I was going to make to you is sometimes counsel feel more comfortable if the alternates don't know they're alternates.

MR. ROBISON: Understood.

THE COURT: And with this seating arrangement it's easy to do because you've got a seat for every one of them. If you have some guy sitting on a chair over there he might figure out that he's on a different level than the other – no pun intended, but he would be or she would be.

MR. ROBISON: Understood, Your Honor. I would still like to state the preference on behalf of Mr. Gray that we go with a 12 person verdict.

THE COURT: Well, we can stick with that if that's what you want and just – Mr. Westinghouse?

[17] MR. WESTINGHOUSE: I'm sorry, I thought we had come to a conclusion.

THE COURT: Well, I'd still prefer to go with the two alternates.

MR. WEFALD: I would, too. I think two is fine.

THE COURT: If we're getting down to the government's estimates, six to seven weeks, these things do tend to speed up after a while and – okay, let's say two alternates. Do you still want an extra challenge for the alternates?

MR. BENTLEY: Yes, Your Honor.

THE COURT: So we're at 18 and 11. Is that satisfactory to all that we treat the 14 as if we're selecting a jury of 14?

MR. WEFALD: Absolutely.

THE COURT: Hearing no objection –

MR. BENTLEY: Your Honor, I would object. I would prefer to take 12, see who they are, and then proceed to the selection of alternates. If the majority is in favor of doing it the other way –

MR. WESTINGHOUSE: Your Honor, may I offer perhaps an alternative that I believe was followed in the Order case and as I understand it was found to be somewhat agreeable to all parties, and that was there was not a distinction between alternates and regular jurors made during the course of the trial and at the conclusion of the case, before the case was [18] submitted to the jury, each side was given the opportunity to challenge a juror, and so the remaining 12 were those that were not challenged by the defense or the United States. In essence, each side reserves one challenge to the end of the case or has an additional challenge.

THE COURT: That's an excellent arrangement and I'll tell you why, there is nothing more frustrating than having two alert alternates sitting there and one sleepy juror to whom you've already committed yourselves and no chance to get that juror off. What about that? That sounds like a wonderful –

MR. BENTLEY: We agree to that, Your Honor.

MR. WEFALD: Great.

THE COURT: So in essence—was that an objection?

MR. KELLOGG: No, Your Honor, I'm agreeable to that, too. I want to go back to something else because I think that maybe I don't understand. If we have two alternates then we're agreeing that if the occasion comes up during the course of the trial we're agreeing to have a jury of 11 rather than 12—

THE COURT: No, there has been at least one objection made to that and if there is one objection made to that I'm not going to force it on counsel.

MR. KELLOGG: Okay. I just wanted to clarify that.

THE COURT: No. We're still sticking with a jury of 12, but you're going to select your 14 as if they're all your jurors and then we will give each side one challenge at the [19] conclusion of the case and that's how we'll select the 12.

Now, wait, let me anticipate a problem. Let's say we lose a person. Do you each get half a challenge? What do we do about that?

MR. WEFALD: If we lose one, the defense gets to challenge.

THE COURT: Somehow that does cut through a lot of the problems. Do I hear a total agreement on that?

MR. WESTINGHOUSE: No. I didn't hear actually the question, but I sense what it was now.

THE COURT: Just from hearing the answer, right? Okay. Counsel, I'm glad I thought of it now.

MR. BENTLEY: May I suggest that the last person in the numerical order be excused in that eventuality.

MR. WEFALD: Oh, no. He's already conceded to our point.

THE COURT: No, he hasn't.

MR. WEFALD: We're going to kick the last one off.

THE COURT: He didn't really.

MR. WEFALD: Didn't you?

MR. WESTINGHOUSE: (Shakes head.)

THE COURT: No. I asked facetiously did everyone agree and Mr. Westinghouse said no. What do we do if we lose one, counsel? Both sides want it this way and I think it's worth making some kind of arrangement and compromise to get it [20] this way because it sure sounds like a good arrangement, but the reason we're having two alternates is we're anticipating we're going to lose at least—obviously if you lose two people there's no problem.

MR. WESTINGHOUSE: I agree with Mr. Bentley, I think if we lose one his proposal is the only reasonable alternative to follow.

THE COURT: The other is to do it randomly, just put all—what would be 13 at that point names in a hat and draw one.

MR. WESTINGHOUSE: That would be fine as well, Your Honor.

THE COURT: One is as random as the other. I mean, taking your last personal.

MR. BENTLEY: That's fine.

MR. WESTINGHOUSE: That's fine.

MR. BENTLEY: I prefer that.

THE COURT: Prefer the random?

MR. BENTLEY: Yes, Your Honor.

MR. ROBISON: May I be heard?

MR. BENTLEY: One thing I'm thinking of, Your Honor, is that this system would perhaps tend to assure more attentiveness on the part of all the jurors because they would all know—

THE COURT: No, I wouldn't tell them that. I wouldn't [21] tell them anything about it. As far as they're concerned, they're all going in.

MR. ROBISON: Your Honor, it seems to me—

THE COURT: They know it's a 12 person jury so they may figure out that somebody is not going in. We could say at that point we haven't—I would rather not say any-

thing and I will listen to what counsel want. My suggestion is you just don't say anything.

MR. ROBISON: I would propose on behalf of Mr. Gray that it be the last person selected because strategically when you exercise your perempts you sometimes would leave that person on thinking that he is going to be the last one—

THE COURT: Not when it's simultaneous, counsel. You really have no way of knowing—you see, when it's simultaneous challenges you don't know who the last person is going to be. The last person really takes on no more significance because what you're doing is taking—let's say right now we had a panel of 30 to 40 to choose from. Say 30. You're going to pick your—

MR. ROBISON: 18.

THE COURT: —18. They're going to pick their 10 and then I can go through and pick the lowest.

MR. ROBISON: Are we passing a ballot?

MR. WESTINGHOUSE: No.

MR. ROBISON: No ballot, all right.

[22] THE COURT: See what I mean?

MR. ROBISON: Yes.

THE COURT: Okay. Can we go with the random then if we're down to one and you each get a challenge if there are two?

MR. WEFALD: Right, that's fine.

THE COURT: So we're back to—we're really back to 18 and 10 with one and one reserved.

MR. WESTINGHOUSE: Your Honor, I thought it was 18 and 11.

MR. RAWLS: That's right, Your Honor.

THE COURT: I'm sorry, 17 and 10 with one and one reserved.

MR. WESTINGHOUSE: That's right.

THE COURT: Okay. Dd you have other things you—

MR. WESTINGHOUSE: Your Honor, the only other matter that we discussed was the matter that the United States had raised by letter with the Court and counsel and that was the subject of the schedule for trial. I think the Court—

THE COURT: Did you get my letter back?

MR. WESTINGHOUSE: No, Your Honor.

THE COURT: It went out yesterday. That's all right, I can tell you right now.

MR. WESTINGHOUSE: All right. Perhaps that moots that issue.

[23] THE COURT: Yes. Well, there are a few other things. One of them is the schedule. I wrote you a very apologetic letter, Mr. Westinghouse, because I know counsel prefer that, but it would be really difficult for the Court to function on that schedule.

For out of state counsel, there have been trials—when there have been lengthy trials, some judges have opted for an 8:30 to 1:30 trial schedule, you know, sort of going straight through, no lunch hour, and using the time that way and Mr. Westinghouse and Mr. Wales had suggested to the Court that I adopt that schedule and I have rejected it and I'm going to stick with the traditional trial schedule.

Let me give you some of my reasons other than that it would be difficult for the Court and that is—it leads me into a few other things on my list that counsel should know about. It's this Court's preference and a very strong one that if there are problems that arise in the course of trial, evidentiary or otherwise, that needn't be dealt with at that very moment—I mean, obviously if it pertains to a document that a witness is about to read to the jury, of course I'll handle it at that time—I'd prefer to handle most

of the matters that counsel suggest we take up at sidebar at the end of a session, not on jury time.

In other words, if we take a 12:00 to 1:30 lunch break for the jury we can come back at one o'clock and we can pound [24] out anything we want. If the jury goes home at 4:30, we can stay 4:30 to 5:00, we can come in a 9:00 to 9:30. I want those extra times for us to fight out those issues so we don't keep the jury sitting around and waiting. In a long trial that can add up.

I also frankly want the freedom if the trial is going very slowing to use those extra half hours, bring the jury in a little early, cut our lunch hour short or stay a little later and add that time on to the trial. I hope we don't have to do that. But I want that option to do that.

Does that worry you, Mr. Wolfe?

MR. WOLFE: No. I think this is perhaps a good time—the defense counsel have a list as well. I think this might be an opportune time to at least address a couple of the matters that we discussed this morning. We had a meeting this morning with all counsel represented, except for Mr. Rawls and Mr. Frost and I was able to talk to Mr. Frost on the phone.

And I have—this is a difficult position to be in, making a request of this nature, but we believe that it would be appropriate and most helpful and would promote a speedy—speedier trial if this trial date were kicked over one week.

Mr. Westinghouse has indicated to us that he will supply the documents that Monday or perhaps the Friday before the trial starts and that it will be a multi-volume document production. We believe that it would be helpful for all [25] defense counsel to have reviewed that, gone through and to work with the government concerning any problems that we might have with the admissibility or the content of any such document.

I can represent to the Court that Mr. Gray and his counsel and a paralegal have reviewed 20 boxes of documents and have pulled documents from those materials; that last week we received another two boxes and it is not through any lack of diligence on the part of the U.S. Attorney or the FBI that the 16 production is still being made, but the fact that this is a very complex case, with numerous documents.

We also received, I was told this morning, somewhere between 12 and 18 inches of long distance toll records within the last week, which we need to review and identify the critical phone calls in the timeframe.

I just—I can represent to the Court that having reviewed the documents since we began receiving them in October and being very diligent in our efforts, that we simply feel that an extra one week is necessary, we feel that it will promote a more efficient trial. Now, with respect to Mr. Frost, I—in my discussions with him I understand that he was appointed three weeks ago, that he had not intended to be present at trial as local counsel prior to that time. He has not reviewed any of the documents. He feels that he is unequipped right now to go to trial. He has been in trial in state court the last two and a half weeks. And that the [26] additional time would assist him in preparing and I can represent to the Court that myself and Nancy Ritter, a paralegal that works for me, we are willing to sit down and spend some time with Mr. Frost in trying to bring him up to speed.

But we are really—we have our backs against the wall and we do not have an extra—we need extra time.

MR. RAWLS: May I address the same item, as I was not a part of all this? Judge, there are numerous boxes of documents that were removed from our office and given to Mr. Kanev as attorney for Mr. Olano. We need those boxes back in New Orleans so that we can sit down and go

back over them. These telephone records and things that they're talking about, obviously I haven't seen them and obviously they are not available to us in New Orleans.

THE COURT: About that, I can tell you right now, Mr. Kanev is going to tell me he needs them here because Mr. Olano is being moved up here and their intent was to use what little time they feel is left between now and trial to review those documents. You're going to have to work that out. There obviously is one set of documents. The Court is certainly not going to order anybody to copy these documents or pay for the copying of those documents. Somebody is going to have to come somewhere and since Mr. Olano is in custody and he's here, I suggest that you give some serious consideration to moving to [27] Seattle for a while, Mr. Rawls, because those documents are here, the marshal's office has arranged for a place for them to be reviewed at some time and trouble at Mr. Kanev's request. Now we're not going to go through moving them back to New Orleans, I can tell you that. So you—leaving that aside, were you asking for more time also, is that what I'm detecting?

MR. RAWLS: Your Honor, Mr. Kalterman's attorney of choice is Ralph Whalen. I am in Mr. Whalen's firm, I am prepared to go to trial, I do have a motion enrolling me as counsel, I have practiced in federal courts in two different districts on a regular basis.

Mr. Whalen will be totally unavailable until after his wife completes a difficult pregnancy. It is scheduled to go five more weeks. However, it's not going to go to term; as I said it will be a difficult pregnancy. If we are given a continuance of a month I'm sure that Mr. Whalen could be here and we would also have plenty of time to examine all of the documents in our office, which is certainly better than reviewing them in some hotel room or at the courtesy of some obliging attorney up here in Seattle.

THE COURT: You mean a month from now or a month from the 23rd?

MR. RAWLS: A month from now.

THE COURT: Can't do it. The Court has other trials scheduled and besides I remember when we went through this and [28] scheduled it counsel had problems with that time, didn't he?

MR. RAWLS: Your Honor, I didn't expect to prevail in my request, but I making my request and I appreciate your hearing it.

THE COURT: We knew about that problem and it was a tough call for the Court to make at that time because I appreciated Mr. Whalen's problem a great deal and I would have liked to have obliged, but given the problems of everyone else concerned we did what we had to do in terms of time. What's your feeling about the week?

MR. RAWLS: Any extra time we get is appreciated, Judge, simply because of the document problem, particularly if these documents keep surfacing up here in Seattle. But I would with respect emphasize this, that neither Mr. Whalen nor I is going to request a continuance on the Court trial for our own personal pleasure or convenience. We do put our client's representation first and we will be here ready to go for trial whenever and wherever the Court says we go.

THE COURT: Thank you, Mr. Rawls. I appreciate that.

MR. WOLFE: The one matter when I looked at my notes that I neglected to add was a request by Mr. Kanev as well. His client, as the Court knows, is not yet in the district and he has spent I believe the New Year's holiday with Mr. Olano but has not yet been able to meet with him on a regular basis and he has indicated that the extra week would greatly assist [29] the preparation of that defense.

THE COURT: Let me tell you the problem, counsel. I haven't heard from the government and how it feels about this. Any strong feelings one way or the other, Mr. Westinghouse?

MR. WESTINGHOUSE: Your Honor, I think it's fair to represent we do not. We can be prepared to proceed and plan to be prepared to proceed on the 23rd. However, as I'm sure is obvious in a case of this magnitude an additional week would certainly be well received by all parties. So I think it's a situation in which we will be here and prepared for trial on the 23rd, but if the Court's pleasure is an additional week—I can understand defense counsel's request.

THE COURT: It's not the Court's pleasure at all, but let me tell you what the situation is, counsel. Right now I have given you the low end of your estimate before I have another trial that has speedy trial problems scheduled for April. There is also the fact that this Court is probably going to be out of town beginning about the 30th of Mrach, for a few days in that period into the first of April.

If you continue it for a week and if the trial goes as long as you think it's going to go and now you have to start getting into really figuring what your trial is going to be, one is you're going to cause the Court problems with the following case and the other is you may end up with a break in your trial, which I was hoping somehow we would avoid by maybe [30] seeing this case accelerate a bit.

Now, I wanted you to know that and see if you still are asking—

MR. WOLFE: Judge, I don't believe that there would be any way that we could avoid a break in the trial given the government's estimate of a six to seven week case in chief. We have not yet been able to determine what the length of Mr. Gray's case will be, we are now in the proc-

ess of—we've developed a theory and we are now in the process of locating the witnesses.

I do think, though, and I can represent to the Court, that the week would give us time both among defense counsel working together to identify problems that might arise during trial based upon the anticipated exhibits that the government would offer and to work with the government and to—to expedite this trial in any manner possible. I certainly don't want to be sitting here for three months.

THE COURT: Oh, counsel, rest assured—

MR. WOLFE: Or even two and a half months, but it may be possible. if I were not in the position of having gone through all of the documents and having reviewed it, I would be more reluctant to make this request, but I think I can represent to the Court that we have been doing every—working daily, full time on this case for several months and that extra time will be critical if we are to go into trial and have a [31] cohesive opening statement that we could present to the jury and identify the witnesses and focus in on circumstantial evidence that will be helpful to Mr. Gray. I just don't think a week is going to be detrimental to—

THE COURT: Well, the only people the week will be detrimental to will be the defendants in the following criminal trial, which as I understand it—well, let me—what I'm going to have to do, frankly, Mr. Wolfe, is take a look at that trial and see what the speedy trial problems are because there are motions pending and there may indeed be exempted time that makes my concerns not as germane as I think they are. If you—if none of you are distressed, dismayed or shocked at the thought of a week or seven or eight day break in the trial, which somehow seems to please everybody rather than—I thought I was going to carry the day on that one for starting the trial right away,

but everyone seems pleased about that – then that concern is removed.

MR. WOLFE: That might be helpful to us.

THE COURT: It might be helpful to you. My concern was your feeling about the jury. Actually my experience has been that the jury is often pleased to get a break at that point also. Let me give it some you thought and get back to you on that.

I just want to say this, counsel: You know, I can see a week and I detect that the government would be almost pleased [32] to go along for a week and I really do believe that the ability to go over exhibits together and curing objections may end up saving almost that much time in trial time.

I just want you to be wary of the fact that almost any case can always use more time to prepare and that if you get the week, this is it, because you really sooner or later have to cut bait and try this case.

MR. WOLFE: We're not suggesting that we would be back asking for more time.

THE COURT: Okay.

MR. WESTINGHOUSE: Excuse me, Your Honor. Might I inquire as to the week – the dates of the Court's anticipated break?

THE COURT: Let me give it to you exactly. March 30th through April – probably be back in trial April 2nd.

MR. RAWLS: 2nd?

THE COURT: It's a Thursday. You might ask me for that – you might ask me not to come back for Thursday and Friday.

MR. RAWLS: April 2nd, you say? You're only talking three days, four days.

THE COURT: I'm sorry, I don't mean April 2nd, I mean April 9th, April 9th.

MR. WESTINGHOUSE: So March 30th through April 9th?

THE COURT: (Nods head.)

[33] MR. WESTINGHOUSE: And if I understand correctly, that's a certain break in the trial?

THE COURT: Yes. Right now I had anticipated that break would kind of come at the end of the government's case and it seemed to me pretty easy timing. Now, it probably with a week's different won't, but counsel don't seem to be terribly distressed at that thought.

Okay. Let me raise some other things while I consider that one, and as I say I'll let you know about that.

MR. BENTLEY: Your Honor, before the Court moves off that topic, let me just, if I may, throw in another fact for Mr. Marler. Mrs. Marler is now eight and a half months pregnant and is expecting her child on February 20th. Mr. – the family has five other children from age 13 on day and Mr. Marler asked me to petition the Court for an extra week on that ground as well.

THE COURT: Sure, but –

MR. BENTLEY: He is ready to come at any time after the birth, but he would like very much to have the opportunity to be present.

THE COURT: Is there something special about the 20th? I mean, how does he know?

MR. BENTLEY: That's what the doctor said. Of course there is a range.

THE COURT: He may know more than other doctors.

[34] MR. BENTLEY: I understand, but I just wanted to give the Court another factor here. We join in this. We would welcome an additional week. We have no problem with the break.

THE COURT: I'm afraid to let that be the basis of the Court's consideration because if she's a week late then

we'll never get to trial on the following week. But anyway, I'll certainly be aware of that. But let me go on and approach some of the other factors that I have on my list that I think I'd like to get out of the way today as long as I have you all here.

Anybody else expecting anything—expecting a baby in the course of this trial?

MR. FROST: I'm not, Your Honor, but I just wanted to concur with the remarks that Mr. Wolfe made about the additional week on behalf of Mr. Ascani. Mr. Ascani's alleged involvement is somewhat different than other defendants so it's not nearly as complex to prepare, but the additional week would really be helpful to us in terms of being able to be up to speed.

THE COURT: Okay.

MR. FROST: Thank you.

THE COURT: The taking of notes, counsel, I think is probably going to be essential in this case and the jurors are going to request it and the reason I'm bringing it up now is it's always a pain to figure after somebody has put on some [35] witnesses and then the jurors ask to take notes—I think we should discuss it now and it's my opinion the jury should be allowed to take notes and they should be allowed to take notes from the beginning so they get the benefit of the opening statements and early witnesses and the whole thing.

I just wanted to clear that with counsel so we don't have it come up in the middle of the case and then somebody says, well, they didn't take notes during my witness, so I don't want them to take notes now. I think if we have them start out—I think we're going to have to explain to them right off that it's going to be a complex case and there's a notebook and if they want to use it, fine. And I'll give whatever the cautionary instructions you want me to

give—you know, the notes don't take precedence over the live testimony, et cetera, et cetera.

There is a suggestion, and I don't know how—it's new to me, but some—it has been used in some long extended cases and attorney seem to like it. As a Judge it makes no difference to me one way or the other, though I'd probably find it helpful and that is the idea of having a little snapshot of the witness attached to maybe the witness' name going back to the jury at the jury at the end of the case so the witness can be recalled in an easier way to the jury. It's just an idea I throw out to you because in lengthy cases sometimes the witnesses—the jurors have a hard time remembering, you know, who was that guy [36] that said this. You know, they have their notes and then they can staple this little—we're not talking about glamour shots, we're talking about like a little passport photo.

I throw that out to you for whatever it's worth. If anybody wants—I don't want it to become a stumbling block or a major issue. I think it's something that's designed to help the jury and not to cause counsel more headaches, but it is a possibility. It can also be helpful in their remembering which defendant is which defendant. So it cuts both ways if we assume—the government may have the bulk of the witnesses. On the other hand it may help the defendants, too.

I would be willing to go along with it if counsel think it's a good idea. I don't expect an answer today. But if you decide to do it, it just would be something to prepare for. If counsel are going to need—

MR. WALES: Your Honor, if I might just ask the mechanics by which—or which the Court imagines would be used. Who takes the picture?

THE COURT: You bring in your own pictures. If you want to do it, your supply the pictures of the people who

are going to be your witnesses and your defendants and then we will make a master list and staple a picture next to every name, and if we don't have a picture for one person, I suppose we could just decide to go in without it or whatever. I mean, your just write down Joe Smith and a picture of him and just go [37] down the witness list. And if you want the defendants, whether they testify or not, to be on that list—they could be. Some people think it helps the jury recall the demeanor of the witness on the stand if they can see a picture maybe six weeks after they've heard the witness testify.

MR. ROBISON: Can we leave that to be resolved between us?

THE COURT: Absolutely. I don't expect an answer today. It's just something, if you're going to do it—I just wanted to give you some food for thought to think about. If you want to do it, fine. If you don't want to do it, it's nothing. It's just one of those things that people who try long cases all the time I guess have come up with as a way of assuring themselves that the jury really remembers the guy who was on the first day.

MR. WESTINGHOUSE: Your Honor, I think that's something that we could certainly accomplish through the use of a Polaroid and I think we would be agreeable to it. Along that same line, if I may, in my prior experience with more lengthy cases I have found it to be helpful or at least I perceived that it may be helpful to send a copy of the exhibit list to the jury. We have our exhibit list or anticipate we will have it all on word processor so that we have the capability of deleting those entries which have not been admitted and adding those which are presented and marked at trial for the first [38] time, and I would ask that we consider the possibility of having the exhibit list available to the jurors for their deliberations. I think otherwise they just cannot find the records.

THE COURT: That is the Court's practice. And if you don't send it back they ask for it anyway. They'll only ask for it the first day because they have no way—they know we have one because they see you using it and they see the magical way in which you refer back to an exhibit and come up with it and they're going to ask for it. I've never heard any one find a reason not to give it to them. so it may be just as well with some notice for you all to start preparing one for the defendants, which brings me to the next question.

Are the defendants going to find a joint way to mark exhibits so that we don't have Mr. Ascani's exhibits and Mr. Olano's exhibits and Mr. Kalterman's exhibits with A1 and B1 C1. Is there any way we can work on that?

MR. WOLFE: That is a topic yet to be discussed. And I think it would take some time—again it will take some time for us to be able to bring together the exhibits and make that decision.

THE COURT: If you had an extra week—

MR. WOLFE: Sun of a gun. I don't mean to hold the Court hostage for an extra week but—

THE COURT: I haven't done settlement conferences for [39] nothing. I know a negotiable item when I see one. I strongly urge you to do it for the jury's benefit. It may be extra work for you now, but I bet it will be to your beefit when you go to look for those exhibits in the long run, because chances are you are going to be using a lot of the same records and it will be easier for you to find a record that another defense counsel has referred to if you don't try to duplicate it in some way or set up your own list.

And in addition to that, I would suggest that you seriously consider coming up with a joint voir dire set of questions rather than each of you giving me the same questions over and over again.

And I'm also going to ask that to the extent that there are any motions in limine or concerns like that you try to make them joint concerns, joint motions. One of the things that I would suggest is that you divvy this up and make one of you lead counsel for purposes of voir dire, another one do the motions in limine and you can feed your ideas into that, counsel, but let them do the wording and the preparation and typing.

MR. WOLFE: We've already taken care of that.

THE COURT: And voir dire, too, voir dire questions?

MR. WOLFE: Yes.

THE COURT: Good.

MR. WOLFE: Then the exhibit list should just follow I [40] hope along that – you've taken care of the exchange of witnesses, voir dire. All right.

Now we come down to what I consider probably one of the more important –

MR. WOLFE: Excuse me, Your Honor. With respect to the proposed instructions that are customarily submitted before trial we would ask that that rule be waived in this case. We would try to submit them – this case is going to be somewhat complex vis-a-vis the conspiracy count and it would be helpful for us to have heard a bulk of the government's evidence with respect to the conspiracy before we are required to submit the instructions concerning that count in particular.

We can, of course, submit boilerplate instructions at the outset, but I think it would be better if we submit instructions tailored to this case and we could do that presumably by the end of the government's case.

THE COURT: Well, it might be good for you to be doing that during that week.

MR. WOLFE: We're working on them right now, but I'm just saying –

THE COURT: Well, let me make a suggestion to you in terms of the instructions. One, of course, I think they should be joint instructions to the extent – unless somebody really has a pet instruction that you feel –

MR. WOLFE: I think Doctor McCuin is in the other [41] case. There won't be an insanity instruction submitted in this case.

THE COURT: Right, that's what I meant, unless there's a special instruction that the rest of you can't go along with.

I think for all intents and purposes you may as well use the Ninth Circuit pattern instructions wherever possible and what I'm going to ask is that you end up submitting to me two sets of instructions. Well, okay. There is the instructions that you have to put on file to preserve your record, okay. All of you want to put in a complete defendants' set of instructions and a complete plaintiff's set of instructions, and then what I'm going to ask that you do is go through your instructions, plaintiff and defendant, and decide which you can agree on and you know there are plenty of them which you can agree on. You should be able to agree on an elements instruction, you should be able to agree on a burden of proof instruction and on an expert witness instruction, you know, all the presumptions, and then give me a very thin pack of the ones you can't agree on, okay. I mean, the ones on which you really have an issue of law that you want to do citations on.

I'm not saying you shouldn't again submit what you want for the record so you have them on file, but I think if you sit down you'll find that you can agree on probably, what, nine-tenths of the instructions and maybe there will be a few, [42] I hope only a few that you can't, and that would make life easier, and that I will say, knowing that that takes a lot of time, we will set a new date on when you

can do the instructions. You can't do that by the first day of trial, I know that.

MR. WOLFE: Judge, Mr. Westinghouse and I were just conferring, are you saying you want the instructions before trial?

THE COURT: No. I'm saying that in exchange for that extra work that I'm asking you to do by sitting down and agreeing on the instructions I would agree to have the instructions – why don't you have them ready for me when I come back?

MR. WOLFE: That's perfectly fine.

THE COURT: But let me just say this. If we notice that the case is accelerating rapidly, somebody better bring to my attention the fact that we haven't done the work on – that you haven't done – because it's always easiest for me on short notice to sit down and work on them, but if I haven't got them and you have to first prepare them, you're the ones that are going to end up with that burden. Do you understand? I mean, cases do sometimes speed along. I'm trusting you're not going to be done before March 30th when I say get them to me by the time I get back. But we'll see. Okay. Meanwhile, that's the new date. [43] Okay. That brings us to – once you've exchanged all your document lists, do you think there is going to be a need for storage of documents here? In other words, in lengthy cases we often arrange to have the parties bring file cabinets in and keep them out in that vestibule out there, so you don't have to cart – you know, by the end of the trial your arms won't have lengthened an inch or two; take back what you need to work on but you can leave stuff here. And we lock the courtroom and it will be okay.

If you want that, you have to make the arrangements. Get a file cabinet over and you can leave it out there and you can each have a file cabinet. I don't want to say as

you want, because thee are too many of you to give you as many as you want. But let's say the defendants can have two, work it out, work it out with Ms. Tyree, and she will make the arrangements of when you bring it in. Okay. Just have it ready to go with whatever you need.

Okay. Now, we come to the two topics that I consider probably the most important and often the most difficult to work out, though maybe defendants have already thought of this, and that is how are you going to handle objections and cross-examination so that we don't have repetition with resulting boredom to the jury, becaue if there is anything that turns a jury off it's seeing another attorney stand up to [44] ask the same questions of a witness. I know you're not going to do that deliberately because none of you would, but have you thought of any systematic way to handle that?

MR. WOLFE: We are in the process of developing a plan for that. It was discussed at this morning's meeting. Counsel have been discussing this problem for a month. We are aware of it and sensitive to the issue.

THE COURT: Okay. What I would think would be – if you are getting witness lists in advance, which you all are, maybe you could assign – and you're getting the documents, you know which documents will go with that witness, maybe one way would be to assign a counsel, usually the defendant's counsel to whom that witness is most pertinent, to cover that witness and then feed in questions and points you want that counsel to cover.

MR. WOLFE: That's basically the plan that we're working on.

THE COURT: Okay. then the –

MR. WEFALD: Your Honor, the objections, in a conspiracy case I went through about a year ago we just – an objection for one defense lawyer was an objection as to

all, so that we didn't have to make a record to preserve it. So if we could just have a standing agreement that if one objects it's an objection as to all on the record.

THE COURT: It's on the record as of now that [45] that will be the case, so you don't all have to stand up. Now, it's not as simple as that, though, because often one counsel will think of an objection that he thinks is the right one and the objecting counsel, lead counsel, who's making the objection may not have thought of it. If you're sitting close you can just go ad heresay, you know, something like that, rather than have everyone popping up to do that.

But why don't you consider that because I'm willing to have one objection stand for all, but you may not be willing to do that if the objecting counsel doesn't make what you think is the key objection and you should, of course, still have the right to add to it if he hasn't done so.

Okay. Now—well, that sounds like you've already given that a gret deal of thought. And I'll throw the lst issue at you because this is going to take, I think, the most time, unless you've already thought of this one. Oh, wait a minute. There are a couple of other ones and that was—there were some questions raised about seating arrangements and the use of the word defendants, that kind of—let me say this about the use of the word defendants. Even if I made the ruling it would be meaningless. I would predict that within the first five minutes of somebody's opening statement, if the government could even possibly avoid it, codefendant would. It's just too much in the vernacular. We cannot really think we can get through a trial without calling the people on that [46] side of the courtroom defendants and this side of the courtroom plaintiffs. I don't know any other natural way that lawyers have of referring to parties in a case. They do so when the jury hasn't even grasped what plaintiff and defendants mean. So I'm going to have to—I just don't think that's a viable suggestion.

MR. WEFALD: Let me just address that point a moment, if I can. I understand the difficulty with it, but what I request is, and I hope counsel for the United States, the plaintiff, will in fact—

THE COURT: See, there you go.

MR. WEFALD: —address as much as we can a specific individual, and I think there is a real danger when we have a conspiracy trial, we're all together, the obvious thrust of it is if we put enough stuff in the air some of it is going to stick, and I think to the extent—maximum extent possible we have to treat the defendants as individuals. I'm confident that notwithstanding the fact that their brief reflects they're the plaintiff, that we are going to hear the United States versus the defendant and the government versus the defendants. The point of it is I thik we want to minimize to the maximum extent possible the kind of lack of indentity, the prejudice that will flow from that, and I just would ask the cooperation of counsel for the plaintiff, the United States, to do that.

THE COURT: Well, let me say this, I would to some [47] extent your concern may of necessity be minimized. I think if the government is going to make this case clear to a jury, and there are problems in so doing because it is a complicated case, they are going to have to use names. They are going to have to be a little more specific than in a general conspiracy case. So I think your problem is going to cure itself. They just can't keep saying this defendant or that defendant or the defendants, because you've got so many transactions, they're going to have to track it through.

As far as seating goes, let's see—we're going to need another table I suppose and my feeling would be we'll just—we've worked it out before with this many counsel. I'm not going to separate it out by defendants. I'm going

to separate it out by the need of this courtroom to get this many people in here and I'll work that out, so I'm not going to say two defendants sit here and five sit there.

Well get enough table in here. You're going to have to sit—you guys can pick wherever you want to sit, but we're going to have to sit more than one or two at a table. Its not going to work otherwise. We're not going to have enough room.

MR. WEFALD: As I counted there are 14 people that are going to be involved at a minimum on the defense side. I'm assuming, Your Honor, that when we talk about additional space we're talking so that my client is going to be sitting next to me so that we will be ble to have the assistance to assist the [48] counsel in the trial of this cae, and I'm contemplating that we're not going to have defendants over here and the lawyers up here.

THE COURT: No, we're not going to have that, but what you may have, for instance—Mr. Bentley is probably the best example of it. You may have Mr. Bentley sitting where he is sitting and his client sitting actually probably bout where that chair behind him is. In other words, there may be counsel at the table where they need to write and defendants may be one row behind them where they can still be turned and talked to, but they may not be sitting at the table. I'm not going to have your defendant sit far enough away from you so that you can't talk to him. We'll do the best we can and we'll work it out.

MR. WOLFE: Judge, we'll sit in the back corner.

THE COURT: Sure you don't want to sit out there. Okay. Now, we're going to turn to that issue I keep talking about and that is jury selection. We have sent out questionnaires to jurors, oh, I'd say roughtly 250 jurors, and asked them—we do this all the time routinely. You know, we've got a long case coming up, how many of you will be

available for this amount of time at this time. Of course it all says starting the 23rd, which may present a problem, but—that's part of what I'm factoring in in whether or not to give you the week's extension, but if you tell me we're still [49] talking roughly the same time period because we're gong to save so much time in that week it could work.

I have received 120—well, let's say roughly 130 or 140 requests for excuses. Now, we do not like to call in jurors and pay them for the day if they're the kind of excuses that all of you are going to agree when they get here they can be excused for anyway.

Now, you can do it one of two ways and I won't tell you which I have a preference for, but you can sit down and go through these excuses and see if you agree that they are the right kind of excuses so that we should excuse them or which should be called in despite the excuses or I could do it and I'm not even going to tell you which my preference is because frankly I don't mind doing it. It doesn't take all that long.

The distinct advantage of me doing it is there is one of me and it may be harder for you to all agree. On the other hand, this is a criminal case an you may want to do it yourselves. In civil cases lots of times the attorneys leave it to me. I don't care which way you do it, counsel. But I've got them here and we need to respond to these people because some of them keep calling everyday and saying am I really going to have to come there for an eight-week trial when I've told you that I can't for such and such, and we keep saying we'll let you know.

I'm perfectly willing to have some you, all of you, [50] select a few or do it all together and sit down in the jury room right now and start going through these, but we do need a decision made. Let me tell you, we have available now 90 jurors that have responded—you know, haven't objected to coming jurors that have responded—you

know, haven't objected to coming in. And if you add up your challenges we're okay. We're well within—even assuming that some people come in and emergencies develop or they suddenly look at one of you and turn out to know you or we read the witness list and they know the witnesses, even assuming—we could lose many and still have enough.

So maybe the easiest way is to just let me do it. On the other hand I don't want any of you feeling that there is something unfair about the larger panel. So whichever way you want to do it. They're here. Here they are. I've got them right here and I brought them out because I anticipated that at least one of you is going to want to go through it yourself; am I right?

MR. RAWLS: Your Honor, if you're just talking about separating the obviously meritorious ones from the questionable ones, I have no objection to the Court doing it itself.

THE COURT: I don't want to do that because I don't know what you consider obviously meritorious.

MR. RAWLS: No, no, no. What I mean Your Honor is that's what we're talking about, you are going to sift through the excuses and decide which ones are still up for grabs and [51] which ones should be final and told not to appear, isn't that what we're saying? In other words, there are some excuses that we all know in advance are going to be granted anyway and I have no objection to the Court doing it. I have no desire to look at those excuses.

THE COURT: Anybody?

MR. WESTINGHOUSE: The United States is prepared to let the task go to the Court.

MR. BENTLEY: I would like to look at them, Your Honor. I might after looking at a few decide that it was something I wouldn't want to spend more time on, but I'm a little uncomfortable with saying that I don't have an interest in something that I haven't even sampled.

THE COURT: Let me do this—

MR. ROBISON: I was just going to join in Mr. Bentley's position. We would like to see them.

THE COURT: Let me do this. Why don't you take the, those of you who want to see them and I would like you—does the government—let me say this, if the defendants see them, does the government want to see them?

MR. WESTINGHOUSE: Yes, Your Honor.

THE COURT: That's often what happens and then if some defendants see them, other defendants want to see them. I want you to do this. I want you to take them, I want you to look at them, and when you've reached the point where everyone is [52] satisfied, then it's—each one of you is willing to put on the record that you feel you've had enough of a chance to review it and as you reach your various levels of boredom looking through these excuses, just come out and say to Ms. Tyree defendant Kalterman is satisfied, defendant Ascani is satisfied, et cetera, et cetera, or stay through, it wouldn't take you all that long and make yourself a couple of piles. People you agree should be excused, people you feel the Court should bring in anyway. Again bear in mind as you read these that we do have 90 people ready, willing and able to serve. So I think that when in doubt about whether you need to haul a person in, remember we don't need, unless you're worried about cross-section, you see, and that is a legitimate concern—that is why I want you to look at them.

MR. BENTLEY: Your Honor, having just completed jury service myself in King county I will look at these with a view to how to write a successful letter for excuses. I was unable to do so myself.

THE COURT: Did you get to sit, Mr. Bentley?

MR. BENTLEY: I was only in the box once and I was stricken by the prosecution, but surprisingly in two weeks I never got closer than that to sitting.

THE COURT: Yes, that's why I question whether we need more than 90 people. What if you did find ten more that you wanted to haul in and we got a hundred people in here. You [53] know, chances are I'm only going to call—you know how I do it, I call numbers, and I probably won't even call half of them. Anyway, think about it. I do want you—since some of you are at least interested I want you to take a look at them.

That, I believe, concudes all the things I could think of for this conference. Did I spark any other ideas?

MR. WESTINGHOUSE: Your Honor, there are two brief matters. One a follow up. Can the Court indicate when we might know about the trial date? It is somewhat of a concern in terms of trying to juggle witnesses. We have at least one early witness who has advised us that he is afraid of flying and will be taking the train. He may have left already. I don't think so, Your Honor, but we do need to know.

THE COURT: If he left already he is probably taking the stage coach.

MR. WESTINGHOUSE: He is coming from that part of the country, Your Honor. He may need a stage coach.

THE COURT: Let me say this, I could probably let you know later today. I'm not thinking that I'm going to give it all that much thought. My concern, quite frankly, is the following case. It was the break in the trial which you've now set my mind at ease about and, frankly, it was the jury, whether this would make a difference starting a week late. I don't want to send out these questionnaires again. This I think is the second time we've sent them out for this case and [54] I don't want to send them out a third time. But if the jury clerk tells me that—well, if I see that we're well within the time that we told them—do you know what I mean, if we told them eight weeks and you're telling

me now we have a six-week case—but you're not telling me that, are you?

MR. WESTINGHOUSE: Well, I hate to have it be quite as certain as the Court just stated. We really do not know, Your Honor, is our problem. It's very difficult to estimate the length of cross-examination for various witnesses. We can certainly anticipate some will incur substantial cross-examination, but it's very hard to predict.

THE COURT: Let me get another reading on this, which I haven't asked, do defendants have any idea how long their collective case is going to be?

MR. WOLFE: As I indicated earlier, it's difficult to give an assessment of that right now.

THE COURT: Not even whether it's like a month or two weeks.

MR. WOLFE: I would not believe that it would be a month, perhaps two weeks. This was an earlier—

MR. ROBISON: We'll know when we see their witness list and the documents because hopefully a lot of the defense would be presented in cross-examination.

THE COURT: Okay. I'll get you an answer at the latest tomorrow.

[55] MR. WESTINGHOUSE: Your Honor, there are two other matters, one again relating to the trial schedule—

THE COURT: Still two other matters.

MR. WESTINGHOUSE: Well, I keep sitting down and more come to when I sit. Does the court contemplate rial on Fridays?

THE COURT: Yes, that was on my list actually. Let me say this, yes, in general, but bear in mind that—in this district Fridays are the days we save for sentencing and TROs and the various million and one other things that come up. My hope is that we will go on Fridays unless I

statement that they have been charged, unless somebody has an objection and then I'd have to know it and deal with it, as to why—it seems to met that that's the easiest way to deal with it, to state it in the opening statement.

MR. WESTINGHOUSE: I don't have any problem in doing that. I would hope that the Court would maintain an open mind with respect to whether the indictment should be forwarded to [57] the jury. We think because of the complexity of the case there are some unique reasons in this instance why the jury should have the benefit of the indictment, because I think without the indictment it's very difficult to keep in mind the individual transctions and how they fit into the indictment itself. And I think in fact in terms of the proof as to the allegations in count 1 and the allegations that are not set forth but are closely related that come in through evidence, the jury needs to know what is in the indictment particularly.

THE COURT: Well, it all depends. It depends on whether the government submits a—one of those instructions that summarizes the whole case and summarizes the indictment. I mean, sometimes—you can't have it both ways, do you know what I mean?Sometimes there's this—it usually comes about instruction number three or four, it's before the elements instructions and after the function of the jury instruction and it sets out what the whole case is about and basically summarizes the indictment. If that's going to go in, then often it's easier not to put in the indictment, but if the indictment—I'd certainly send it back if the government felt strongly that—I don't know whether to send back the whole indictment; I don't know that they need to see everything about Zaki Mansour.

MR. WESTINGHOUSE: I'm not so concerned about that if we have an understanding that we can advise the

cannot—there is something I really have to schedule because I could start trial at 10:00, for instance, and I can get my sentencings done by doing them earlier. So my hope is in general to go on Fridays. The best I can do is give you as much warning as I can. I can't—I really usually don't know often until the week. If I know in advance that I've got something going on that Friday, I will let you know.

MR. WESTINGHOUSE: I think we understand and that's fine for planning purposes. The last matter that Mr. Wales and I wish to raise is the matter with respect to the indictment. As the Court knows the superceding indictment contains approximately 7 counts, the first nine of which relate to the defendants before the Court now, the latter part of the indictment relates to the two defendants who have been severed.

[56] We, of course, believe it important that the jury understand that Mr. Mansour and Doctor McCuin have been criminally charged because we anticipate that a defense that we may hear is that the problem was all created by those two gentlemen and the government hasn't done a thing about it. We don't think that's appropriate.

I'm looking for some guidance as to whether the entire indictment will be presented to the jury, whether only the first nine counts will be presented to the jury, and if that is the case some assurance that the Court will advise the jury that the other defendants have in fact been charged.

THE COURT: Well, this may help a little. I don't usually send the indictment to the jury. I often count on the jury instructions to set forth the government's cae adequately and I do not find that the indictment clarifies matters. And I would suggest that what we—the way we handle this is to find a statement that would not—some innocuous way way of stating in the government's opening

jury in opening [58] statement or in closing argument that they have been charged. I'm not concerned about that and we are certainly prepared to limit it to the courts relating to these defendants. But I think in terms of trying to summarize particularly the conspiracy that may be a very, very time consuming and difficult task, which obviously needs to be addressed in terms of our opening and closing, but I'm not certain that I am comfortable in doing that to the exclusion of the indictment.

THE COURT: Okay. But we will have some reference in your opening statement to the existence of the other two counts or whatever.

MR. WESTINGHOUSE: Fine, Your Honor.

MR. RAWLS: If I may respond at this time, Your Honor, I would object to the indictment going to the jury. It's the road map of the government's case. Your Honor has already indicated that you're going to let the jurors take notes. If in a couple of months the government can't let these people figure out what the government thinks was going on, and I think that's the government's problem, they don't have a case, I would object to the indictment going to the jury, particularly an indictment that contains so much extraneous matter.

I have a particular problem since my client is even in the government's own telling of the story a minor party and with all of this going in to the jury of what the grand jury wants to say about all these other people, I don't think – I [59] think it's going to be close to prejudicial to my client.

THE COURT: It's obviously premature now for me to make any kind of a ruling. I don't know how much extraneous material there is because I don't know what's extraneous and what isn't because I haven't heard the proof. So I understand the concern and some time in seven or eight weeks we'll probably face this issue again.

MR. RAWLS: I'm sure we might hear from it again. Also speaking as to the Friday possibilities, if I were here and my client was here, we would love the opportunity to spend one day a week going back to our regular affairs, but my client and I are both traveling from Louisiana and the longer this trial goes on the greater inconvenience it will be to him and to me. so the Court's position that Friday will generally be a trial date other than when the Court has other things that have to be done is certainly an acceptable one to us.

THE COURT: I would predict that except for really unavoidable matters we'll probably go on Fridays, even if we start at 10:00, and what I would do then probably, counsel, would be just to cut the lunch hour and make it from 12:00 to 1:00 and make up a half hour that way or go a little later or something like that.

You still have two matters, Mr. Westinghouse?

MR. WESTINGHOUSE: No, I'm at the end of my list, Your Honor. Thank you.

[60] THE COURT: Does anyone have anything else?

MR. ROBISON: Could I confer with the prosecutor before we adjourn?

THE COURT: Sure.

MR. WEFALD: Can I mention something while he is conferring?

THE COURT: Sure.

MR. WEFLAD: I appreciate the Court's concern about Friday. Insofar as we might be taking Fridays off, just some advance notice would be helpful for those of us from out of state. The only Friday that strikes me right off the bat that would be useful for my purposes to take off would be Friday, April 17th, which is Good Friday, the Easter weekend. It's typically a nice –

THE COURT: Counsel, we're not still going to be in trial by April 17th, are we?

MR. WEFALD: You're coming back April 9th, I understood.

THE COURT: Oh, yes.

MR. WEFALD: In any case, if we're there, I would appreciate the Court's consideration on that. That's typically a weekend that has some signficance to many families and it would be nice to be home.

THE COURT: That's true; you need some time to get there, too.

[61] MR. WEFALD: I can get home leaving here at 5:00 on the day—I will be home that same night. So the Thursday I can get back home and be back all day on Friday.

MR. RAWLS: Begging the Court's indulgence, am I to understand that I can't get those records back to New Orleans between now and trial?

THE COURT: I think it's highly unlikely. I mean—I've had no request, written request

MR. RAWLS: They were taken from our office a couple of weeks ago and I wan't in on what was said and what wasn't said, but I think we were under the impression that they were only going to go to a hotel room and they wound up back in Seattle, and I don't want to represent to the Court that that's what was agreed because as I say I was not a part of it.

THE COURT: I think you'd better discuss this with Mr. Kanev. I have nothing before me on any of this other than his need for the documents and his concern about getting them here and he finally managed to work that out. This is the first time it has ever come to my attention that anyone else—

MR. RAWLS: The first opportunity, Judge.

THE COURT: Right.

MR. RAWLS: Of course if we start a week later that will help solve that problem.

THE COURT: In that you could review them here, you mean, get here a little earlier?

[62] MR. RAWLS: I didn't really want to go to Mardi Gras this year anyway, Your Honor.

THE COURT: We seem to be cutting across every holiday New Orleans has.

MR. BENTLEY: Your Honor, one brief matter which I mentioned on behalf of my own client and perhaps others. What is the Court's attitude toward the defendant's ability to excuse himself with a waiver of presence during phases of the case which may or may not relate directly to him? the defendants do have a right to be present, but it seems to me there may be occasions during a trial when a defendant chooses to waive that right for whatever reason.

THE COURT: As long as he waives it and put it in writing that he chooses not be here and we'll rely on your being here to cover his constitutional right and all that, I have no problem with his not being here. I just don't want to hear that in some way, you know, he missed something or something along those lines.

MR. BENTLEY: Thank you.

THE COURT: Anything else, counsel? I'm sure you'll think of things as soon as we leave. I would appreciate it if—if now would be a good time, since you're all here and you have some time, why don't you take some time and look over those excuses and at least see what you plan to do about them.

If some of you want to come back, say, after lunch and [63] get more involved with them—what I need to know is who wants to do it and who is satisfied so I have on the record that we can start making responses. I just want to be clear that each of you feels comfortable that you'ave had enough input into the selection of the panel. You can do it right here in open Court if you want after I go. It may be

more comfortable here than in the jury room. You decide. But you have all the ones that we have at this point.

THE COURT: Anything else?

MR. RAWLS: Just a comment that I am registered at the Stouffer Madison and will be in town tonight and early tomorrow morning if anybody needs to see me about anything, and I would appreciate if the Court decides what the trial date is going to be a phone call or let me—I'll check with the Court before I leave town.

THE COURT: But don't leave, because I'm sure you're the one they do want to see about some of the matters that were discussed when you weren't present. And do you want to at least take a look at those excuses?

MR. RAWLS: I'm going to stick around. I'm just saying I'm in town and fully available until my plane leaves late tomorrow morning.

THE COURT: And, Mr. Rawls, you did say that you have a motion to be admitted?

MR. RAWLS: Motion to be enroll, yes, Your Honor.

[64] THE COURT: Okay. Ill take a look at that today. Okay. Court will be in recess.

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. CR86-202R

UNITED STATES OF AMERICA, PLAINTIFF,

VS.

JOSEPH S. ASCANI, ET AL., DEFENDANTS.

VOLUME 1
PAGES 1-235

TRANSCRIPT OF PROCEEDINGS IN THE ABOVE-ENTITLED AND -NUMBERED CAUSE, BEFORE THE HONORABLE BARBARA J. ROTHSTEIN, UNITED STATES DISTRICT COURT JUDGE, ON MARCH 2, 1987.

[2] THE CLERK: CR 86-202R, United States versus Joseph Ascani, et al. Counsel, please step forward and make your appearances.

MR. WESTINGHOUSE: May it please the Court. Bob Westinghouse and Tom Wales appearing on behalf of the United States.

MR. FROST: Good morning, Your Honor, Mike Frost appearing on behalf of defendant a Ascani.

MR. KANEV: Kenneth Kanev for defendant Olano, who is not present in Court yet, Your Honor.

THE COURT: Counsel, we should have an order. If you don't have an order, how are we going to do the rest of

the trial. Let's go. Mr. Bentley, you're up next.

MR. BENTLEY: Yes. Allen Bentley representing Brian Marler. May the record reflect his presence at this time.

MR. ROBISON: Your Honor, my name is Kent Robison. I represent Raymond M. Gray. He is present here.

MR. WEFALD: I'm Robert Wefald, representing David P. Neubauer and he is present in Court.

MR. KELLOGG: Terrence Kellogg, Your Honor, representing Davy Hilling, who is also present.

MR. RAWLS: Good morning, Judge. I'm John Rawls and I represent Stewart Kalterman, who is present in Court.

THE COURT: Counsel, we have a number of matters to [3] take care of, not the least of which is I believe there are some defendants that have not been arraigned on the superseding indictment, is that correct?

MR. WEFALD: That's correct, Your Honor.

THE COURT: Shouldn't we proceed with that before we do anything else?

MR. WESTINGHOUSE: That would perhaps be an appropriate thing to get out of the way, Your Honor. My record reflects there are four defendants who have not yet been arraigned on the superseding indictment. They are defendants Joseph Ascani, Stewart Kalterman, David Neubauer and Guy Olano.

THE COURT: Does that fit with counsel's—

MR. WEFALD: That's correct.

THE COURT: Could those four individuals approach the lecturn with their attorneys and we will proceed with an arraignment at this time?

MR. KANEV: Your Honor, I will alert the Court, my client is not here, and you may not want to do this twice.

THE COURT: No, I don't want to do it twice. Mr. Olano is not here. The marshals assure me he'll be here—why don't you go on back, counsel. We'll wait and do this—well, we'll figure out a way to do this before—while we're getting the jury impanelled. It's all going to come at the same time, but in any event, he should be here by 10:15, Mr. [4] Kanev, if you're getting worried, or did you hear the same word?

MR. KANEV: I heard nothing.

THE COURT: Let me fill you on what I've heard. There was a problem in the marshal's office. They let me know and they've gone to get him a while ago and he should be here between 10:00 and 10:15. I figured we had enough to discuss pretrial conference. It's not the kind of thing that I think requires his presence, or do you feel differently?

MR. KANEV: I'll take the Court's lead. That's fine.

THE COURT: Counsel, basically I thought that it might be a good time to check out a few of the motions in limine that need to be ruled on prior to opening statements, the first of which—not in any special order of importance, but just because it happens to be here in front of me, is I am not going to permit the—let me ask, Mr. Bentley, was it your motion on the—whose motion was it on the Pride Air inaugural video tape?

MR. BENTLEY: That was my motion, Your Honor.

THE COURT: Were you seeking to do that in opening statement?

MR. BENTLEY: Yes, Your Honor.

THE COURT: The motion is denied. That doesn't mean it's denied for trial, but I am not going to allow the tape to be played until I have a chance to see how much of it is [5] redundant and repetitive. When I've had a chance to see it, I will rule on how much of it can be played in the

course of the trial, but it's denied for purposes of opening statement.

As far as any of the motions in limine—I don't know how many of the motions in limine the government was going to address in its opening statement, I mean any of the subject areas contained in the motions in limine that you need a ruling on right now.

MR. WESTINGHOUSE: Your Honor, I believe that—Mr. Wales and I believe there are three matters that have been raised by motion in limine that we would ask the Court to address prior to opening statement. The first is the subject of the acquisition of Irving Savings. We had planned to spend a substantial period of time in our opening statement dealing with that acquisition.

THE COURT: I can rule on that immediately. I am overruling—I'm denying the motion in limine to exclude evidence on the acquisition of Irving Savings. In the Court's opinion it is relevant as background information for the jury to understand the nature in which these transactions—the background in which they occurred and it's clearly relevant.

MR. WESTINGHOUSE: There are two additional matters, Your Honor, which I would ask the Court to consider, the first of which relates to the motion of defendant Olano to exclude evidence with respect to regulatory action at Alliance [6] Federal. I am aware of no similar motion with respect to regulatory action at either Irving or Home, but we do need to dwell a bit on that particular aspect of the case.

The other area that I would ask the Court to consider at this time is the matter of the 404(b) evidence with respect to the forgery evidence as it relates to defendant Hilling.

THE COURT: As far as the regulatory action the Court can rule on that quite easily. I do think that that

is again not only relevant, but important for the jury to understand because it was against the background of that regulatory action that other actions took place and it was because of that action, at least the government alleges, that certain subterfuges may have been necessary, and so it certainly is relevant and the Court will deny that motion.

As far as the forgery is concerned, why is it necessary to refer to that in opening statement, counsel, let me just ask you?

MR. WESTINGHOUSE: Your Honor, I think the concern that may arise with the jury, if it is not addressed in opening statement, is how does this particular bit of evidence fit in, because it is clearly different and unique from all of the other evidence that they are going to be hearing, in the sense that it does not relate to a banking institution, nor does it relate to an event that is within the same time sphere. We concede both of those. We nevertheless believe [7] that it's relevant because of the pattern that it establishes in terms of the assignment dated September 7th, which is the subject of great concern with respect to the Alliance Federal letter of credit.

THE COURT: Mr. Kellogg, do you want to address that?

MR. KELLOGG: Yes, Your Honor.

THE COURT: Counsel, if I look around a lot, it's because it's an unusual seating arrangement, to say the least, and it is going to take a while to find you all. So if I say like Mr. Kellogg and kind of look over at two tables worth of faces—okay.

MR. KELLOGG: Your Honor, I think that on behalf of Mr. Hilling we pretty much set out our position in our memorandum, and that is that it's only the government's theory that makes it relevant. And what we're concerned about is if the Court in the balancing test, which is re-

quired of it, determines whether or not the probative value of that isolated incident five years remote in time is sufficiently strong enough to outweigh the prejudice, the obvious prejudice to Mr. Hilling, then of course it is going to come in.

We submit that it is such damaging evidence that it falls in that class of Mr. Hilling is guilty in this case because he admitted having forged a document five years prior, and it's exactly the type of extrinsic evidence which 404(b) does not permit, because its prejudice outweighs any possible [8] relevant inference which would serve to establish the government's case.

All they have to show is that Mr. Hilling—evidently it's the government's position that Hilling forged his own name on that document or caused another to forge their name, as I read their trial brief. The only way that they intend to establish that is by bringing in evidence of government performance bonds that Mr. Hilling, according to the FBI investigating agent, acknowledged having signed such a document with the name of another and caused another employee of his to do the same.

I submit that the prejudice far outweighs any relevance that that evidence could have.

THE COURT: Do you want to respond, Mr. Westinghouse?

MR. WESTINGHOUSE: Yes, Your Honor. Mr. Kellogg is indeed correct, that it is our theory that with respect to the assignment in question Mr. Hilling did cause his own name to be signed by another individual. That is the theory that we present that assignment for.

The evidence with respect to the performance bonds is relevant because it shows on a prior occasion Mr. Hilling doing exactly the same thing, both with respect to himself signing the name of the purported agent for the bonding

company and causing an employee to sign the name of an agent for the bonding company.

[9] We think that there could be no clearer evidence of the pattern, if you will, of this man using others and using themselves to sign the names of other individuals. In this case, it happens to be his own name, but because of the regulatory action there was a very clear reason why he did not want to sign his own name himself.

We believe that we can support that by evidence from another witness that in fact he contacted Mr. Hilling and caused the document to be forwarded from New Orleans to Bozeman to an address given to him as that of Mr. Hilling.

I would submit to the Court that the information with respect to the prior forgery is relevant. I would also indicate, however, that we can certainly not mention that in the opening statement and allow the Court to hear the evidence up until that point, if that would be a procedure that might make the Court more comfortable with the evidence.

THE COURT: Frankly, it would. I think this, unlike the other two, which obviously I had no problem with, I think this is a much closer question and I think the Court would be better informed if I were hearing the evidence up until that point, rather than rule in the abstract.

MR. WESTINGHOUSE: I will be prepared to delete that from my opening and we will then raise it at the appropriate time.

Your Honor, there is one additional matter that I [10] believe should be raised. In Mr. Kanev's motion on behalf of his client entitled "Defendant Olano's motion for order authorizing his limited participation as trial counsel," there is a paragraph on page two which reads, "We raise this issue not to imply that Mr. Olano is not in any way

dissatisfied with present counsel, but merely to express undersigned counsel's inability at this stage, anyway, to be properly prepared on some aspects of the case."

We are concerned about that statement in terms of a possible argument, if there is a conviction, of ineffective assistance of counsel down the road and we would ask the Court to inquire of Mr. Kanev as to his intended meaning with respect to that statement. If he is not prepared, then perhaps that is something we need to explore further, as opposed to leaving it open and then having the possible issue raised at a later point.

THE COURT: Mr. Kanev?

MR. KANEV: Thank you, Your Honor. The statement was correct when I set it forth in the motion and it's correct at the present time. In fact, it was only over the weekend, and this is after I saw the government's trial brief and was able to preliminarily respond to it with our motion in limine relative to the Alliance cease and desist order, that this area of the trial and its importance as far as the government is concerned became known to me.

[11] Briefly looking at the government's witness list, there are perhaps a half a dozen witnesses who have some affiliation with the Federal Home Loan Bank Board and at this point I can assure the Court that my client, being a lawyer and being a lawyer who is experienced in banking law, is in a better position to make inquiry of these witnesses.

As I pointed out in my motion, this trial promises to be fairly lengthy. I don't mean to slow things down in any way or create issues. I'm more than willing to proceed forward and this is with my client's understanding, so that as we get closer in time to these witnesses I can see whether I feel comfortable being in the position to cross-examine witnesses who may very well be key to the government's case against my client.

As I've suggested to the Court, the motion was made so at least the Court would have as good of a lead time as possible, given the fact that the issue surfaced in the government's trial memo, and if the Court would just consider the motion under advisement until the appropriate time or shortly there before that time, that's satisfactory and acceptable to us.

THE COURT: Fine, Mr. Kanev. It is. But I think that Mr. Westinghouse raises some concerns that the Court must address head on and that is you are prepared to go forward today, are you not?

[12] MR. KANEV: Yes, Your Honor.

THE COURT: If it should turn out – you know, one way of treating this is I can take it under advisement and we can see how things go. The other is that if I'm thinking of denying the motion, it might be a good idea that I let you know as soon as possible, so that you could start working with your client to glean from him the information necessary for you to cross-examine.

MR. KANEV: I can assure the Court I've been diligently working with my client for some time now, at least the last month that he has been in the Seattle area, and specifically on this subject matter area, so we're going to continue to do that and not assume that the Court will grant the motion.

THE COURT: That's what I need to know, Mr. Kanev. There are two questions about your state of preparedness: One, are you ready to go forward today, and the other is, assuming the Court denies your motion, are you ready to go forward today, assuming that you had to do the case in its entirety on your own?

MR. KANEV: If that's your ruling today?

THE COURT: If that becomes the ruling in the course of the case, would you be able to go ahead?

MR. KANEV: I don't know. I can't predict how well I will—or how confident I will feel in rather complicated [13] areas of banking regulation law. I just over the weekend read about these regulations 41Bs and all sorts of other regulations that apparently are going to surface during the course of the trial.

THE COURT: Is it a lack of time, Mr. Kanev, that's bothering you, because I assume that every lawyer in this room, to some extent, has to cope with the banking regulations.

MR. KANEV: I think it's more a lack of notice of the subject area and the emphasis of the government's presentation.

THE COURT: Are you telling the Court that you were unaware that these banking regulations would come into the case?

MR. KANEV: At some point in time I learned that there were cease and desist orders, but until I received the government's brief I didn't appreciate the full magnitude, as far as the case against my client was concerned.

THE COURT: Well, I don't know exactly when these issues are going to surface in the case, how far down the line. Mr. Westinghouse—

MR. WESTINGHOUSE: Perhaps I can be of assistance, Your Honor. We intend to proceed in more or less a chronological fashion and more or less in the order that is set forth in the trial brief. So with respect to Mr. Kanev [14] and the regulatory action as it relates to Alliance Federal I believe that we can safely say that it is not going to arise until the third or fourth week of trial at the earliest. We will be dealing with regulatory action but as it relates to Irving Savings and Home Savings during the first weeks.

MR. KANEV: With that proffer, again I go back to the position that I suggested to the Court in our motion,

and that was if the Court would just take the motion under advisement, hopefully we could deal with the issue when we got there.

THE COURT: I'm willing to do that, Mr. Kanev, but I think the concern is if we get there and the Court denies the motion, are you then going to claim that you are not prepared to go ahead? If that's a problem and if you're not prepared, I would just as soon face it today than face it mid-trial, because we do have a number of other people dependent upon this, and I don't want to be in the middle of trial faced with your saying, well, without my client participating I'm not prepared to cross-examine these witnesses.

MR. KANEV: I'm aware, as is the Court, of the law that says a defendant is entitled to a fair trial, not a perfect trial. I will follow whatever order the Court renders, and to answer Your Honor's question, if the motion is later denied I will go ahead representing Mr. Olano to the best of my ability.

THE COURT: Mr. Wales, you look like you want to [15] respond.

MR. WALES: Your Honor, I wonder if the Court would consider making inquiry of Mr. Olano when he arrives concerning his willingness as a defendant in this matter to going forward on this basis.

THE COURT: What are you suggesting if he says no, Mr. Wales?

MR. WALES: Then I think we have to proceed from that point, Your Honor. Our concern and the reason we raised this in the first instance is simply that we would like to avoid, if we can, going through the entire trial before the issue is raised.

THE COURT: Well, it seems to me that Mr. Olano has had the same amount of time to prepare for this trial as everyone else has had. It's true he has been out of the

district for a while, but his counsel has been down there to see him. He has been brought back here. There has been plenty of time for him to prepare. He is going to have three weeks at least before these issues come up, during which time he will be as an articulate individual able to inform his counsel, just the way any client does, what he knows about banking, so that his lawyer can intelligently cross-examine.

I mean, not every lawyer knows everything about everything at the beginning of the case. If you're representing somebody who has an esoteric area of expertise, [16] presumably the client educates the lawyer and that is what's going to happen, I assume, in three weeks.

What are my alternatives, counsel? Are you suggesting I ask Mr. Olano, Mr. Olano says no, I don't want to proceed, and I stop a trial that we're ready to go forward with or sever him and go to trial separately? I mean, is the government going to be willing to go along with that if he says no? Because I can tell you what the odds are that Mr. Olano will choose to go to trial today if I give him the choice. It may have nothing to do with the fact of how prepared he is for trial.

MR. WALES: Perhaps I misunderstood Mr. Kanev, Your Honor. I understood him to be representing to the Court that he and his client are prepared to go forward. It seemed to me simply a formality to ask his client but one which might well serve us in the end. Certainly we are prepared to go forward regardless.

THE COURT: Well, I can certainly inquire of Mr. Olano when he comes, but I—I will be happy to do so. But think we may be creating problems.

MR. KANEV: It's the government's concern, so that's fine with me, Your Honor. Your Honor, since it was my motions in limine that precipitated the Court's ruling on a

couple of these areas that we have gotten through in breakneck speed and acknowledging the Court's rulings on a couple of the areas, at [17] the same time may I perhaps be heard on the ruling of the Court with respect to the regulatory action that impacts Alliance and specifically my client?

THE COURT: The breakneck speed, Mr. Kanev, was due to the fact that I assumed that you had put most of your arguments in your brief and I've read your brief. If you have something in addition, please add it.

MR. KANEV: I do. Thank you, Your Honor. Your Honor, first of all—and in the brief I pointed out that—maybe it wasn't on that issue. Your Honor, I think you're entirely correct.

A couple of points, though. We do not contend that the government could not introduce evidence that the loans in which Mr. Olano is involved were substandard or violated regulations, okay? That's a basic principle. There's relevancy and, quite frankly, I don't think we could very well argue unfair prejudice that would inure to Mr. Olano.

What it is that we're objecting to, though, is—and the import of the motion—is to the admissibility and blanket admissibility of the existence of the cease and desist orders.

As I said, just over the weekend I was trying to get up to speed on the cease and desist aspect of the case. We've got an August 1982, essentially a voluntary cease and desist, and then a June 1984, where there is a stipulation and consent [18] enforcement order by the Eastern District of Louisiana, which incorporates the 1982, essentially, consent C and D.

What our argument is, rather than this blanket admissibility of having any number of Home Loan Bank Board witnesses testify that there were these C and Ds, we submit

that the government has to zero in and show specifically the relevance of how any one of the loans or credits or banking practices that are relevant in this case violated the C and D order consent of '82 and the Court imposed order of '84.

Based on the evidence—and again I only have an inkling of what the government has and it was gained primarily through their summary and their trial memo—based on the evidence that we're aware of at the present time we can see only very slight violations or alleged violations of these C and Ds and the only one I can focus on right now is perhaps that Reg. 41B, which deals with appraisals.

And in light of that, we are asking for a 403 balancing standard to be applied, and if the Court so applies the standard, we have to think, absent a further proffer by the government, that the Court is going to be in a situation of unfair prejudice to my client and perhaps others as well in this case.

THE COURT: Well, the Court's made its ruling, and that does mean, Mr. Kanev, that as the issues come up, if the government hasn't established some relevance in the course of [19] the trial, you won't have a right to object at the time, but I am not going to make the government right now go through a showing of proof of every regulation they're about to refer to. I think that is a unnecessary pre-trial proffer.

I think that based on what I've read it seems pretty clear to me that the government intends to restrict their proof to those regulations that set the background and set the stage for people trying to circumvent those regulations. If you think otherwise, the Court will give a limiting instruction or order to strike or will sustain an objection at the time.

Denying the motion in limine doesn't mean I'm ruling it's admissible; in other words, you still have a chance to object at the time.

MR. KANEV: Thank you, Your Honor. Your Honor, the second area that we touched upon is again our motion in limine regarding what the government characterizes as the looting of Irving Savings. I think that's what the Court ruled on. I didn't hear the "looting," but that was the rather descript term the government used in its brief, so that I have to focus in on that. I guess it's the acquisition and looting. I think it fell into that transition stage.

The Court's made its ruling, but I haven't heard anything in response to our fallback position, and that is that at the least, and I'm not saying that this is going to [20] clear any spillover prejudice or reduce the—I guess the purpose of our motion for severance, but we haven't heard from the Court whether the Court, as far as the other defendants in the case are concerned, whether the Court will give a limiting instruction, and what I proposed was—from what Mr. Westinghouse told me the first two weeks of the trial is really the rise and fall of Irving Savings, and what I suggest is when the government starts to go into Irving Savings a cautionary limiting instruction at the beginning of the testimony and then perhaps counsel can wave a flag or something when we have gotten through the transition stage—or I'll alert the Court, I didn't mean to be facetious. I can alert the Court when I think the Court might appropriately give the limiting instruction a second time to reinforce that with the jury.

THE COURT: Any objection to that, counsel?

MR. WESTINGHOUSE: Your Honor, I think the concern that I have with respect to that is that it sets a precedent which I do not think is appropriate through the course of the trial.

While it is true that we are going to be proceeding somewhat chronologically and by definition that means that we are going to be focusing first on the events at Irving and moving through then the events at Home and finally

through the events at Alliance, I don't think it's appropriate for the [21] Court to highlight in a conspiracy case this evidence applies to this defendant, this evidence applies to this defendant, this evidence applies to this defendant because that's in essence what Mr. Kanev is asking the Court to do.

Certainly when we have a particular rule of evidence that limits the admissibility of evidence, then it is appropriate for a limiting instruction; 404(b) evidence, for instance, hearsay evidence, for instance, where there is a statement of the defendant that may be admissible only against that defendant.

But where we're talking about evidence which deals with the genesis of the conspiracy, the formation of the conspiracy, which then the evidence will establish Mr. Kanev's client joined in progress, I think it's totally appropriate to have that evidence come in and to have that evidence presented to the jury without a limiting instruction.

So I would ask the Court not to make it a practice to give limiting instructions either with respect to the acquistion and looting evidence or with respect to any other evidence as it relates to single defendants.

THE COURT: Why don't we just say I'll take a look at it, Mr. Kanev, and think about it as it comes up, but I'm highly reluctant to give a limiting instruction of this nature before I've heard the evidence. That doesn't mean that maybe I wouldn't be inclined to give it at some point, maybe with [22] the rest of the jury instructions, but I'll think about it. Let me take another look at your proposed instruction.

MR. KANEV: The option it will leave me then is, I guess, at—when we've heard the testimony of each and every witness called by the government in the rise and fall of Irving Savings, I will be making the objection on relevancy known and renewing our request for a cautionary instruction.

THE COURT: Why don't you do that, Mr. Kanev, because it's very likely that in the course of trial I may forget, and feel free to remind me.

MR. KANEV: I hope I'll remember.

Your Honor, a couple of other areas. And my client has just arrived, it's 10:10, so he's missed everything we've spoken about up to now, but I will brief him with a couple of areas, although I guess we get into the area that the government has raised as far as representation.

I would suggest if—maybe I could have a little time to bring him up to where we are and it will save the Court time in the long run.

THE COURT: That would probably be a good idea, but as long as Mr. Olano is here maybe the thing we ought to do is go ahead with the arraignments, which I keep coming back to. It's something we shouldn't just forge ahead to trial without.

* * * * *

[320] THE COURT: Ladies and gentlemen, that brings us to the conclusion of the morning session. You are gonig to be excused now for lunch. I will remind you you must not be discussing the case amongst yourselves or with anyone else, nor are you to overhear or see anything in connection with the case in your comings and goings from the courtroom.

You may retire to the jury room. We will be starting promptly at 1:30. We have cut a little into your lunch hour. You'll just have to eat a little faster. But we will see you back here. You may retire to the jury room now.

Counsel, if you'll wait a moment, please.

MR. BENTLEY: Your Honor, may we be heard after the jury has left?

THE COURT: That's why I asked you to wait, counsel.

(Jury retires to the jury room.)

THE COURT: Why don't you all be seated? We have a number of matters to take up.

Mr. Kanev, did you have a matter you wanted to take up with the Court?

MR. KANEV: Yes, Your Honor. Your Honor, at the mid-morning break I was alerted at the last minute by Mr. Bentley, who could see through the door, there is a little glass pane in the door, and he saw jurors waiting outside. My client still had not arrived. He thereafter arrived in the custody of two uniformed building security guards.

[321] I just got to the vestibule when he arrived. In fact, the guards had removed the handcuffs from my client feet outside of the door, but the one guard still had the handcuffs in her hand, I saw them, I heard them, and, more importantly, at least two jurors who stood within two feet of me saw the same thing, and actually it's the juror in the far left seat, back row, the young man in the purple tee-shirt

today who actually said to the others when he saw these events, "Whoops, I think we'd better go back into the room," and at that point he ushered everyone else backwards, and as I say there were at least – I think they were lined up just that way, so the two people behind him I know for a fact saw because they were looking and they saw the incident, as I did. As far as whoever else saw it, I don't know.

Our position is we can't voir dire the jurors to assess the degree of prejudice that this would have in their minds, and I wonder whether any cautionary direction, such as the Court had given just moments before as they recessed, would unring whatever prejudice has been created.

I merely bring it to the Court's attention and I guess that's it. I would move for a mistrial in light of prejudice that I think must be engendered in the minds of at least three of those jurors, but, again, to make a record to show the prejudice I'm totally frustrated because just tactically I don't think that we want to explore that either

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[428] THE COURT: That's it. Let me talk to the juror. You're right, there is case law. You have to all agree. If one of you doesn't agree, I'll just talk to the juror tonight. Okay. Easy. That will be taken care of.

Let me go on to some of the other matters. Mr. Kanev, what's the story, are you going to give an opening statement or aren't you?

MR. KANEV: I'm going to give an opening statement. I'm still wavering, but to give you an answer, that's my answer.

THE COURT: That's not simply just a matter of making up an answer. The government needs to get its witnesses lined up.

MR. KANEV: I've already spoken to Mr. Westinghouse. He said he could live with my wavering.

THE COURT: How much time do you need?

MR. KANEV: I think 45, and, again, 45 minutes to an hour is what I indicated to the Court yesterday.

THE COURT: Well, Mr. Westinghouse, if you can live with the wavering, that means you'll probably have someone here pretty early in the morning ready to go, either way.

MR. WESTINGHOUSE: Yes, Your Honor.

THE COURT: Let me just deal with one other thing. There is not going to be court on Friday, but what I would like to give you a little bit of warning about, there is a [429] possibility that after I excuse the jury on Thursday we may stay a little late and I'll try to deal with some of the motions in limine and just take some time with yhou that we never have at the end of the day, but Thursday we could stay late. I just didn't want anyone to make any plane arrangements for, like, 5:00 or 5:30 or something like that.

Okay. The other matter I will put off taking up at this time is the question of the motion for mistrial because I really need to get more information on what exactly took place out there. I've heard a bit of a different version, Mr. Kanev. That is not to doubt what you're telling me. It's to doubt in the haste of your going out there that you may have seen something that was not exactly accurate. It's my understanding that – let me find out before I even go into what it's my understanding of, if there is another side or what the story is, and I don't have time to do that today for obvious reasons. I didn't want to take any time out from opening statements.

The other matter I want some help on, Mr. Olano, because you're the person who's involved, though it's not your fault, in the breaks do you need to go back downstairs?

DEFENDANT OLANO: Not on all breaks, Your Honor. On some breaks I do.

THE COURT: I mean, couldn't you take care of whatever you need to do up here like everybody else?

[430] MR. KANEV: We actually requested that yesterday and I saw Guy ushered out. I don't remember who it was. They wouldn't let him stay here.

THE COURT: Okay. I would like – I'll talk to the Marshal's Office about this. So far they have been late in bringing you up at every break and the Court cannot have that and it's not your fault, and although I said I'll start without anybody else who came late, it doesn't seem fair to you, Mr. Olano, to do that if it's not your fault you're late. I've spoken about it. It's not been cured. So I think the only solution will be for you to stay up here on the breaks and if the marshals need to take a break, they will have to do it in a different setting. But we're going to just take care of this now.

Well, counsel, I think that takes care of us for the day. What have we got, we've got probably – I counted 15 minutes, Mr. Robison, Can you do it in 15 minutes?

MR. ROLBISON: I'll shave it down. I'll be 15 minutes.

THE COURT: Okay. That's all I count that you have left, though I will say this, I know you haven't wasted a minute. It's been a very full hour and a half and I appreciate that. But the way I kept the time you've got about 15 minutes left, give or take a couple of minutes, if you want to wrap up.

[431] We'll start out with your – the end of your opening, and Mr. Bentley, you've got 45 minutes to an hour?

MR. BENTLEY: Yes, Your Honor.

THE COURT: Maybe Mr. Kanev has 45 minutes to an hour.

MR. KANEV: I answered affirmatively.

THE COURT: Nobody will be upset if you change your mind.

MR. KANEV: Thank you.

THE COURT: It certainly seems as if we'll wrap up openings tomorrow morning and then go on to putting on evidence. Let me take a recess now so I can talk to our juror. See you back here tomorrow, counsel.

(In chambers.)

THE COURT: Mr. Griffin, you must be tired. I've read your request, Mr. Griffin. I don't know how I can emphasize to you the problems it will cause in this case.

JUROR GRIFFIN: In that case I will just have to work it out. .

THE COURT: Why don't I suggest something to you. Will it be a help to you if I wrote your employer?

JUROR GRIFFIN: No, it's in the contract. I belong to the Teamsters and I thought they paid full time. I should have checked it before I came. They pay two weeks per contract year.

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[10399] MR. RAWLS: I want them in there, Your Honor.

THE COURT: You want pictures or sounds in there?

MR. RAWLS: I want the whole phrase, yes, ma'am.

MR. WEFALD: I thought the problem with 18 and 31 was the penalty and not the other language.

THE COURT: That's right, but as long as I was going through and changing it, it struck me that "signs, signals, pictures or sounds" had little to do with the case, but if somebody wants it, by all means we'll leave it and we'll just change the penalty.

Okay. What I've done in 13, counsel, is basically I've inserted—I guess it would be line 8, fifth, you know, underlined, just like the others are underlined, the fifth element is described in instruction 14, and as long as we're doing this over we're going to clean up line 16 and 17 and give them a fresh copy. Is there any problem with that?

MR. FROST: Is there any conflict between the language about certain elements being required to be proved beyond a reasonable doubt and one of them being required to be—

THE COURT: I suppose you could say there's—I mean, maybe you'd better read 13 through and see if that creates any conflict, because 14 makes it very clear that the fifth element only has to be proven by a preponderance.

MR. KELLOGG: 13 still says on the first page at line 10 that—

[10400] THE COURT: Yes, we'd better leave that. That's going to be confusing.

MR. KELLOGG: It makes sense, because when read in conjunction with 14 they have four beyond a reasonable doubt and one by preponderance.

THE COURT: Yes, but then you don't say it—why don't we say "and the fifth by a preponderance of the evidence." I think you'd have to say that. All right?

MR. WESTINGHOUSE: That's fine, Your Honor.

THE COURT: Okay. I think we'll just have to read that through again and make sure that it all follows.

My next area, before you go—I know you're raring to go. My last question, and I'd just like you to think about it, you have a day, let me know, it's just a suggestion and you can—if there is even one person who doesn't like it we won't do it, but it is a suggestion that other courts have followed in long cases where jurors have sat through a lot of testimony, and that is to let the alternates go in but not participate, but just to sit in on deliberations.

It's strictly a matter of courtesy and I know many judges have done it with no objections from counsel. One of the other things it does is if they don't participate but they're there, if an emergency comes up and people decide they'd rather go with a new alternate rather than 11, which the rules provide, it keeps that option open. It also keeps [10401] people from feeling they've sat here for three months and then get just kind of kicked out. But it's certainly not worth—unless it's something you all agree to, it's not worth your spending time hassling about, you know what I mean? You've got too much else on your mind. I don't want it to be a big issue; it's just a suggestion. Think about it and let me know.

I think the last matter is—Mr. Frost, you had an objection to put on the record?

MR. FROST: Yes, Your Honor, I have two brief matters. First of all, on behalf of Mr. Ascani I would move for a mistrial on the ground that the government misstated the evidence during the course of the summation, specifically with respect to indicating to the jury that Mr. Ascani had brought the Tahoe Marina Development Loan papers to Seattle.

There is absolutely no evidence to that effect at all and I

would submit that was a misstatement of the evidence, it's very prejudicial to Mr. Ascani. I would move for a mistrial on that basis, as well as for the inflammatory remarks by counsel at the end of the summation, which essentially brought in issues that are broader than the guilt or innocence of those defendants into this trial, by suggesting that they shouldn't be allowed to get away looting financial institutions of this country.

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[10608] more defendant's closing arguments and you still have the government's rebuttal remarks, so you must not be discussing the case with anyone or amongst yourselves.

See you back here tomorrow, you may retire to the jury room. Counsel, wait a moment, please.

(Jury retires to the jury room.)

THE COURT: Why don't you be seated, counsel. Frankly, Mr. Bentley, it struck me that they've heard about enough for the day. I think they probably will be better able to concentrate tomorrow morning. It would have gone till 5:00. As it turns out, counsel, in my figuring, it's six of one, half a dozen of the other, whether we take care of our business now or take a prolonged lunch hour tomorrow, which is what we would have had to do because we do have some matters to take care of. One is alternates. Have you all given some thought to—I hope you have given some thought.

MR. FROST: I'm sorry?

THE COURT: Alternates. Remember?

MR. ROBISON: I'd kind of like an opportunity, as I'm sure the government would one more time before we make that choice, to eyeball the jury. Can we do it after the argument is completed? We will be ready after the argument is completed to do it.

THE COURT: One of the reasons I recessed early was to—you want to wait. Well, let me make a suggestion. then, [10609] why don't you do it during the lunch hour.

MR. ROBISON: Fine by me.

THE COURT: You want to do it at the end of your—

MR. WESTINGHOUSE: Well, I'm only trying to—

THE COURT: You want to get one more—

MR. WESTINGHOUSE: What I want to do is use the lunch hour time to organize my thoughts based on—

THE COURT: You don't have to worry about their doing—you can pick your alternates tonight. You may have a pretty good idea of who you want your alternates to be.

MR. WESTINGHOUSE: We will be prepared to submit our name tomorrow, Your Honor.

THE COURT: You don't have to stay here. I don't want to cut into your lunch hour.

MR. WESTINGHOUSE: No, that's fine.

THE COURT: But you may not feel the need to eyeball the jury again the way the defendants do, in which case you can pick your name tonight.

MR. WESTINGHOUSE: We do need to chat among ourselves a bit more, so if we would have until tomorrow.

THE COURT: Now, the second question is have you given any more thought as to whether you want the alternates to go in and not participate, or do you want them out?

MR. ROBISON: We would ask they not.

THE COURT: Not. Also somebody referred to the [10610] pictures going to the jury. I forget—somebody did.

MR. KELLOGG: I did because there is a notebook there, Your Honor.

THE COURT: Well, does that mean I don't hear any objection to that notebook going back in? The problem is I gather defendants didn't take pictures, at least some of the defendants didn't take pictures of their witnesses. Now, they're not going to forget what the defendants look like because they have stared at them for three months. Do you care? Some of these people are people that defendants have ended up using and referring to quite a bit, too.

MR. FROST: I haven't seen the photographs myself yet. Maybe we could check that to see what the witnesses are dressed like.

THE COURT: Dressed like? Why don't you take a look now, Mr. Frost.

I'd like to get something out of way tonight, counsel, for having sent the jury home, so we don't leve everything until tomorrow.

Counsel, let me just raise one problem and it's a little different than—we usually have simultaneous challenges here, that means you go at the same time.

It occurs to the Court there may be a problem there, because what if you both challenge the same juror? Then I'm left with 13 jurors.

[10732] It wins with not guilty. It wins with any verdict that you come back with with which you can live.

Please give us fair and honest consideration of the believable evidence. Please give us a fair and honest application of the law. I can ask no more than that on behalf of Ray Gray, his wife, his daughter. Thank you, and have a good life.

THE COURT: And on that note, ladies and gentlemen, we reach our recess for the noon hour, though it's not the noon hour any more. It is past that, but I did promise you an hour and a half for lunch and I'm going to keep that promise. That means you will be back here, ready to go by 2 o'clock and you will at that time hear the Government's rebuttal remarks, and as I assured you, you will be receiving the case today for your deliberation at the conclusion of the Government's rebuttal remarks.

Remember, arguments are not over yet. You must not begin discussing the case amongst yourselves until I actually give you back those jury instructions and tell you that you may begin your deliberations. You must not be discussing it amongst yourselves or with anyone else. See you back here at 2 o'clock.

Counsel, if you will wait a moment, please.

(The following proceedings occurred out of the presence of the jury:)

[10733] THE COURT: Counsel, have a seat.

That brings us to the conclusion of defendants' closing arguments. You will have an hour and a half, Mr. Westinghouse, to respond. Are you going to split it?

MR. WESTINGHOUSE: No, I am going to do it, but I thought I had two hours.

THE COURT: No, no, no. I mean an hour and a half to prepare.

MR. WESTINGHOUSE: Yes.

THE COURT: I don't want to take your time. Do you have your alternate's name? Do you want to give me a slip with it before you leave?

MR. WESTINGHOUSE: Your Honor, we need to discuss it for just another moment.

THE COURT: How about you all?

MR. ROBISON: Can we discuss it over the lunch hour and submit it after lunch, Your Honor?

THE COURT: Yes, but really do it, because at the conclusion of the Government's case, I've got to say something or fourteen people are going back in that room. Otherwise I send fourteen people back in while you decide and that's usually not something anybody wants me to do, because we're going to start sending exhibits in and the whole works.

MR. ROBISON: We'll meet right now.

[10734] THE COURT: Okay. You can all stay here as long as you need to to take care of it.

See you back here at 2 o'clock.

(Noon recess.)

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[10735] AFTERNOON SESSION

(2 p.m., May 28, 1987)

(The following proceedings occurred out of the presence of the jury:)

THE COURT: I worry when I hear you all having this much fun, Counsel. Maybe you've decided to stay here another week or two.

Yes, Mr. Bentley?

MR. BENTLEY: Just for the record, Your Honor, there were four Marler exhibits, 1886, 1887, 1888 and 1889, including all of the sub-exhibits within those series, which I believe we had an understanding could be admitted. The Government indicated no objection to them on foundation bases.

However, there has been some confusion with the clerk as to whether these were formally offered or not, and I note that yesterday they were not indicated as received but they are now indicated as received, based on an informal representation that I made to the clerk. In order to make sure that the record is clear on this point, I do formally offer them at this time.

MR. WESTINGHOUSE: No objection.

THE COURT: Hearing no objection, they will be admitted.

[10736] (Defendant Marler's Exhibits Nos. 1886, 1887, 1888 and 1889 for identification received in evidence.)

THE COURT: Well, Counsel, I received your alternates. Do I understand that the defendants now—it's hard to keep up with you, Counsel. It's sort of a day by day—but that's all right. You do all agree that all fourteen deliberate?

Okay. Do you want me to instruct the two alternates not to participate in deliberation?

MR. KELLOGG: That's what I was on my feet to say. It's my understanding that the conversation was the two alternates go back there instructed that they are not to take part in any fashion in the deliberations.

THE COURT: I want to explain to you another instruction I'm going to give to the jury, assuming I remember between now and the two hours yet to come, so that you understand it and aren't mystified when you hear it.

This jury will be deliberating in Judge Beeks' courtroom at the end of the hall. It's a small courtroom but a big jury room. They will have tables and chairs and other tables for the exhibits. They'll have a coffee pot and it will be very

comfortable, much more comfortable than they would be in here with all the exhibits. But what we plan to do is give them—for those of you who don't know, Judge [10737] Beeks is now retired. He never comes in any more. His chambers are really virtually empty.

We are going to give them access to the chambers so they can use the facilities and have a refrigerator and be comfortable. If I give them an instruction that says not to look at any of the books in the chambers, you will understand what I mean. There is a set of the United States Code. We are taking 18 USC out of the set, so you don't even have to worry about it if they should decide to peek.

MR. ROBISON: Title 12, too. It's all banking.

THE COURT: All right. We'll take Title 12 and Title 18 out. But even so, I think I will give them that additional instruction. I think by now most of the books have been removed, but we do know there is this one set left. I just want you to understand when I give that instruction why I'm giving it so you're not all kind of mystified by it.

Well, have you told each other who your alternates are?

MR. WESTINGHOUSE: Yes, Your Honor.

THE COURT: Okay. I'll announce it at the end. I'm kind of glad you reached that decision, Counsel. I kind of think they deserve it. They really have been just a superb jury, and I think they'll be glad.

Well, Mr. Westinghouse, are you ready to go?

MR. WESTINGHOUSE: Yes, I am, Your Honor.

[10738] MR. FROST: There is just one thing, Your Honor. I don't remember if any of the instructions indicated they would not be provided with a transcript of the testimony of witnesses. It has been a long trial and I'm sure that's going to be the first question that comes out.

THE COURT: It's going to be the first question. I would be inclined to answer it, "Rely on your collective

memories." I am sure you're all going to be in favor of that because once we start giving them one witness, they could be here forever.

They don't realize that when they ask. They think it's just a nice innocent request, and of course we have the transcripts handy—the fact of the matter is, we may not have the transcripts handy. Then we're going to be in a position where they're waiting for that. So if you're all agreed, I could either wait until the first question from them and just write out the answer at the time without even calling you, or I could give them the instruction now. Either way. I would give it to them orally. I saved three to read to them at the end. Why don't I just give it to them now?

MR. FROST: It seems to make sense to do it that way.

THE COURT: Okay.

(The following proceedings occurred in the presence of the jury:)

* * * * *

[10801] few minutes to get all of that together, especially since we are not going to be putting it in this jury room, you will be glad to know, but in a room that will have a great deal more room for you and the exhibits to coexist side by side.

Now, where you are going we hope will be very comfortable for you. We anticipate it will be. You will have access to some other rooms as well as the room you're going to be deliberating in. I just want to advise you in those other rooms there may be some law books. In case you're curious, they are the chambers of the senior judge who has now retired. You will see it's right at the end of this hall. There may be some law books still left in there.

You are not to look at them. You are not to consult them for any reason. Remember, I've told you so many

times – I'll tell you once more – your decision can only be based on the evidence in this case and the law as I have given it. But since they will be there, I just want to make sure you remember that.

Often in a case of this dimension, one of the first questions the Court receives from the jury is "Can we see transcripts of testimony?" Let me save you some time. Don't send out the question because the answer will be "You must rely on your collective memories of the testimony." You've seen counsel refer to transcripts. They are portions, a drop in the bucket of what it would take to transcribe all [10802] the testimony in this case. Most of what you would ask for wouldn't even be transcribed yet. And to start transcribing, you'd be here for a very, very long time.

also, it does give emphasis to one portion and not another, and you've had the ability to take notes and you're going to have to rely on your collective memories. Each of you has his or her own notes and I sort of will tell you that we would probably deny any request. If you feel absolutely compelled to ask me, ask me, but for the most part, I suggest that you rely on your collective memory.

One other matter. We have indicated to you that the parties would be selecting alternates at this time. I am going to inform you who those alternates are, but before I do, let me tell you, I think it was a difficult selection for all concerned and since the law requires that there be a jury of twelve, it is only going to be a jury of twelve. But what we would like to do in this case is have all of you go back so that even the alternates can be there for the deliberations, but according to the law, the alternates must not participate in the deliberations. It's going to be hard, but if you are an alternate, we think you should be there because things do happen in the course of lengthy jury deliberations, and if you need to step in, we want you to be able to

step in having heard the deliberations. But we are going to ask that you not participate.

The alternates are Norman Sargent and Shirley Kinsella. [10803] I am going to ask at this time now, ladies and gentlemen, that you retire to the jury room and begin your deliberations. We will let you know as soon as the time for the big move comes from this room to the other room. You might want to collect your belongings after you've selected your presiding juror.

If you will retire to the jury room, please.

Counsel, if you would wait a moment.

(At 4:14 o'clock p.m., the jury retired to commence deliberations.)

THE COURT: Counsel, have a seat.

We just have a few matters to take care of. Before we go any further or do anything else, would Mr. Kanev and Mr. Rawls hand in their right to testify forms?

MR. KANEV: Yes. In that regard, Your Honor, my client has signed the document. I pointed out that in it he has interdelineated with my knowledge and approval the reason why he didn't. It dealt with the Court's rulings on his prior adjudication, and last week I told the Court that I would submit a written proffer in that regard.

After consulting with my client, we have decided that I would not, just so that the record is complete, and we would stand on the statement as made on that document.

* * * * *

[10807] MR. RAWLS: Yes, ma'am.

THE COURT: Mr. Kanev, you will be available for questions?

MR. KANEV: I'll be available. My client wishes to waive his presence, given his custodial situation. I am going to handwrite a waiver which I will sign and hand to the clerk.

THE COURT: Okay. Is he going to be moved back?

MR. KANEV: No. He's going to be local, but he would rather remain in Kent. There is a writ in progress, another problem, but we're trying to work on that; a writ in progress from Louisiana.

THE COURT: Okay. Well, I trust before you all leave you'll give me those.

My next question to all of you is the stipulations. Anybody have any strong feelings whether they should go or should not go? They ordinarily, I guess, do not go, but if you want them to go, they will go.

MR. RAWLS: I would suggest they not go unless they be requested. I think these people have been taking notes. Ordinarily jurors do not take notes. These people obviously have their notes.

THE COURT: Hearing nothing else, they will not –

MR. BENTLEY: I'm sorry. Nothing else about

Supreme Court of the United States

No. 91-1306

UNITED STATES, PETITIONER

v.

GUY W. OLANO, JR., AND RAYMOND M. GRAY

ORDER ALLOWING CERTIORARI.
Filed May 18, 1992.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

May 18, 1992